Supreme Court of the United States

OCTOBER TERM, 1969

No. 249

CLEMON BARLOW, ET AL.,

Petitioners,

—v.—

B. L. COLLINS, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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"DOCKET ENTRIES"

December 2, 1966	Complaint, Motion for Preliminary Injunction filed
December 5, 1966	Summons issued with Complaint and Motion for Preliminary Injunction
*December 21, 1966	Motion to Dismiss, filed by defendant J.A. Minter, Jr., dba J.A. Minter and Son, with Demand for Oral Argument
*(don't know date)	Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction filed
February 1, 1967	Motion to Dismiss Complaint as to defendants Collins, Godfrey and Freeman filed with Memorandum in Support of Motion to Dismiss as to these defendants
*February 14, 1967	Plaintiffs' Memorandum in Opposition to Motion to Dismiss of defendant Minter filed
February 20, 1967	Plaintiffs' Memorandum in Opposition to Motion to Dismiss of defendants Freeman, *et al.* filed
February 21, 1967	ORDER entered denying defendant Minter's Motion to Dismiss and directing that the cause as between plaintiffs and Minter proceed to pretrial but GRANTING Motion to Dismiss of defendants Collins, Godfrey and Freeman in their official capacities
February 23, 1967	ORDER entered transferring case to Northern Division of Southern District of Alabama
*March 2, 1967	Answer of defendant Minter filed
April 14, 1967	Motion for Clarification of Order entered February 21, 1967 filed by plaintiffs with Memorandum in Support of Motion, and Proposed Order Attached

April	26, 1967	Notice of Appeal filed by plaintiffs from that part of the ORDER entered on February 21, 1967 granting Motion to Dismiss of defendants Collins, Godfrey and Freeman
May	1, 1967	$250.00 deposited by plaintiffs as cash bond on appeal
May	24, 1968	Argument and Submission in the Court of Appeals for the Fifth Circuit
July	16, 1968	OPINION issued by the Fifth Circuit Court of Appeals and Judgment Entered

*Omitted by stipulation

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2494-N

CLEMON BARLOW, SINNIE BLOCTON, WALTER BLOCTON, ARTHUR BROWN, WILLIE GILCREST, ELIJAH GREEN, OTIS HALE, WILL MOORER and WILL WILLIAMS, on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

J. A. MINTER, JR., doing business as J. A. Minter and Son; B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, as Administer of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture, DEFENDANTS

COMPLAINT—Filed December 2, 1966

1. This is a civil action brought by Plaintiffs:

(a) To declare Title 7—Agriculture, Chapter VII —A.S.C.S., Subchapter A, Part 709 et seq., Assignment of Payment, 31 Federal Register 2815, F.R. Doc. 66-1689, filed February 16, 1966, ("Assignment Regulation") invalid and unauthorized by law on the grounds that said regulation is in excess of statutory authority of the Food and Agriculture Act of 1965 and to enjoin the utilization of the Assignment Regulation;

(b) To enter judgment against Defendant J. A. MINTER, JR., doing business as J. A. Minter and Son ("MINTER") for moneys paid by the United States Department of Agriculture-Agricultural Stabilization and Conservation Service for subsidy payments which would have been paid to Plaintiffs had not Defendant MINTER illegally barred them from working the land on his plantation;

(c) To enjoin and restrain Defendant MINTER from removing certain Plaintiffs from their homes on the Minter plantation and compelling Defendant MINTER to negotiate leases with these Plaintiffs for the year 1967.

2. The jurisdiction of this Court arises under the Constitution of the United States and, in particular, Article III and the First, Fifth and Fourteenth Amendments thereto, and under the laws of the United States and, in particular, Title 28 U.S.C. Sections 1331, 1337, 1343, 1346, 1361, 2201 and 2202, Title 42 U.S.C. Sections 1981 *et seq.* and the Civil Rights Act of 1964. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

3. (a) Plaintiffs are citizens of the State of Alabama, County of Dallas, and are or were tenant farmers on the plantation owned by Defendant MINTER. Plaintiffs have been tenant farmers on this land from eleven to sixty-one years, and Plaintiffs W. BLOCTON and WILLIAMS have been on this land all their lives.

(b) Plaintiffs represent the class of Negro tenant farmers in Dallas County, the State of Alabama and the South who are victimized by the utilization of the Assignment Regulation. This class is so numerous as to make joinder impracticable. There are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class and the representative parties fairly and adequately protect the interests of the class.

4. (a) Defendant COLLINS is the State Director of the Alabama Agricultural Stabilization and Conservation Service ("A.S.C.S."), which maintains its office in Montgomery, Alabama. Upon information and belief, Defendant COLLINS resides in Montgomery, Alabama.

(b) Defendant GODFREY is the Administrator of A.S.C.S., which operates within and is responsible to the United States Department of Agriculture.

(c) Defendant FREEMAN is the Secretary of the United States Department of Agriculture and is authorized by law to promulgate regulations, *inter alia*, for the

administration of the Food and Agriculture Act of 1965, and did promulgate the Assignment Regulation. Both Defendants GODFREY and COLLINS are responsible in part for enforcing regulations promulgated by Defendant FREEMAN, including the Assignment Regulation.

(d) Defendant MINTER is a wealthy plantation owner who leases or has leased land to Plaintiffs and many other Negro tenant farmers. The Minter plantation is located at Tyler, Alabama.

FIRST CLAIM AGAINST DEFENDANTS COLLINS, GODFREY AND FREEMAN

5. On or about the 3rd day of November, 1965, the President of the United States signed into law the Food and Agriculture Act of 1965 which provided federal subsidy payments for landowners, tenant farmers and sharecroppers, *inter alia*, for voluntarily reducing the amount of cotton produced. These payments were payable, upon request, *one-half in advance* upon signing for the program, pursuant to Chapter VII A.S.C.S., subchapter B, Part 722, 1966 Upland Cotton Program, Section 722.813, 31 Federal Register 4884, filed March 23, 1966.

6. (a) The said Act also provided for assignment of the benefits under this program as follows:

> "Section 402 . . . (13) The provisions of subsection 8(g) of the Soil Conservation and Domestic Allotment Act, as amended (relating to assignment of payments) shall also apply to payments under this subsection."

(b) Section 8 (g) of the Soil Conservation and Domestic Allotment Act, as amended, provides, *inter alia*:

> "A payment which may be made to a farmer under this section, may be assigned, without discount by him in writing *as security for cash* or advances *to* FINANCE MAKING A CROP . . ." (Emphasis supplied)

(c) Chapter XI, Agricultural Conservation Program Service, Part 1110 *et seq.*, Assignment of Payment,

20 Federal Register 6511, September 3, *1955* evinced the intent of the legislature by providing, in part, as follows:

> "Sec. 1110.2 *Payment may be assigned to finance making a crop.* A payment which may be made to a farmer (hereinafter referred to as the 'assignor') under Section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. *Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.*" (Emphasis supplied)

7. In February 1966 the assignment regulations were amended by Defendant FREEMAN to permit *the assignment of payments for cash rent.* Section 709.2 of the regulations was amended by changing the second and third sentences thereof to read as follows:

> "To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor *and the payment of cash rent for land use therefor;* (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm." 31 F.R. 2815 (Feb. 17, 1966). (Emphasis supplied.)

8. Plaintiffs submit that the Assignment Regulation is invalid and unauthorized by law in that it exceeds the statutory authority in that Section 8 (g) permits the assignment only "as security for cash or advances to finance making a crop." The congressional authority which must be the basis of the Defendant's authority does not permit a regulation to permit the *assignment of payment for cash rent* which in no way "finance[s] making a crop."

9. (a) The Plaintiffs herein and those similarly situated as tenant farmers on the land of Defendant MINTER were each year required to execute a rent note as security for the cash rent of this land. The note operated as a lien on the crop and farm equipment owned by Plaintiffs until the rent note was paid. In the interim, Defendant MINTER would provide Plaintiffs with:

(1) a certain amount of cash for expenses, e.g., $10.00 a month (which was repaid with interest out of the income for the crop);

(2) credit in Defendant MINTER's local store for groceries and supplies to "make a crop" at generally excessive prices (also repaid *with interest*); and

(3) an uninhabitable shack to live in.

(b) The Plaintiffs and those similarly situated had no choice but to make all purchases from Defendant MINTER since they had no other credit and no income from previous years. At the end of the season, the rent and the debt to Defendant MINTER would leave no profit (after minimal living expenses) and the cycle would repeat itself.

(c) The Food and Agriculture Act of 1965 was designed to change this legalized "involuntary servitude" by providing for advance payments as hereinbefore set forth. These would permit Plaintiffs and those similarly situated to avoid Defendant MINTER's interest rates and excess profits and permit, on the other hand, cooperatives where Plaintiffs could purchase their requirements at wholesale, permitting them some return at the end of the year's labors.

10. (a) The Assignment Regulation provided Defendant MINTER with the opportunity to demand that Plaintiffs and all those similarly situated assign the aforesaid benefits in advance as a condition to obtaining a lease to work the land.

(b) Plaintiffs BARLOW, S. BLOCTON, HALE and WILLIAMS and those similarly situated refused to sign and were denied the right to work the land.

(c) Plaintiffs BROWN, W. BLOCTON and GILCREST and those similarly situated did sign the assignments and have lost the benefits as hereinbefore set forth.

11. Plaintiffs show that this is a proceeding wherein they seek a declaration of their rights pursuant to Title 28 U.S.C. Section 2201 and an injunction restraining the utilization of the Assignment Regulation. There is between the parties an actual controversy as hereinbefore set forth. The Plaintiffs and others similarly situated and affected on whose behalf this suit is brought are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of.

12. Plaintiffs have no plain, adequate to complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights. Any other remedy to which Plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the Plaintiffs and those similarly situated

SECOND CLAIM ON BEHALF OF PLAINTIFFS BARLOW, S. BLOCTON, HALE AND WILLIAMS AGAINST DEFENDANT MINTER

13. Plaintiffs repeat and reallege the First Claim with the same force and effect as if fully set forth herein.

14. In or about May of 1966, Defendant MINTER denied Plaintiffs BARLOW, S. BLOCTON, HALE and WILLIAMS the opportunity to work land on his plantation in order to deprive these Plaintiffs of their rights

under the Food and Agriculture Act of 1965 to receive subsidy payments and particularly advance subsidy payments. Defendant MINTER's actions were illegal and for the sole purpose of depriving Plaintiffs of the above benefits and to obtain said benefits for himself in that:

(a) The Assignment Regulation is illegal and invalid;

(b) The Assignment Regulation, even if valid, gave no right to Defendant MINTER or any other plantation owner to compel Plaintiffs to assign; it merely permitted assignment by the tenant farmer if he so chose;

(c) Defendant MINTER did not require extra security (the Assignment) to guarantee payment of his cash rent for the leasehold, since the rent note creating a lien on the cotton crop in itself was sufficient to cover the rent owed and in fact exceeded the rent.

15. At all times hereinbefore mentioned, Defendant MINTER acted to deprive these Plaintiffs of their rights to receive advance subsidy payments with which they would form cooperatives to buy food at wholesale and reasonable prices in lieu of the excessive prices demanded by Defendant MINTER of those captive consumers with no funds to purchase elsewhere. Upon failure to sign, Defendant MINTER was able to obtain the subsidy payments for himself as compensation for inability to receive his excessive profits at his store.

16. Upon information and belief, Defendant MINTER received the subsidy payments which otherwise would have inured to the benefit of these Plaintiffs by hiring day laborers (who receive no subsidy payments under the Food and Agriculture Act of 1965) to work the land previously worked by these Plaintiffs.

17. Plaintiffs BARLOW, S. BLOCTON, HALE and WILLIAMS and those similarly situated were damaged by Defendant MINTER as to the amount of the subsidy payments paid to Defendant MINTER under the Food and Agriculture Act of 1965 for the land previously worked by these Plaintiffs.

THIRD CLAIM ON BEHALF OF PLAINTIFFS BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN AND MOORER AGAINST DEFENDANT MINTER

18. Plaintiffs repeat and reallege the First Claim with the same force and effect as if fully set forth herein.

19. (a) Plaintiffs BARLOW, W. BLOCTON, BROWN and GILCREST are four of the six Plaintiffs who brought suit in the District Court of the District of Columbia in a case styled *Brown et al.* v. *U.S.A. et al.*, Civil Action No. 2259-66, to, *inter alia*, declare invalid and enjoin the utilization of the Assignment Regulation. This suit, which specifically names Defendant MINTER as one who had abused the utilization of said regulation, was discontinued prior to the filing of this suit.

(b) Plaintiffs BARLOW, S. BLOCTON and MOORER defied Defendant MINTER by refusing to sign the Assignment Regulation. Plaintiff MOORER obtained a loan to pay the cash rent.

(c) Plaintiffs BARLOW, BROWN, GREEN and one Pearl Moorer, wife of Plaintiff MOORER, traveled to Washington, D. C. to testify as witnesses in a case styled *Williams et al.* v. *Freeman et al.*, Civil Action No. 1991-66, which sought, *inter alia*, to reform the A.S.C.S. voting regulations and did result in delaying the date scheduled for the holding of said elections in Dallas County as well as the entire State of Alabama. Plaintiff W. BLOCTON submitted an affidavit which was offered in evidence for that same case.

(d) Plaintiff W. BLOCTON was a candidate for Community Committeeman in the 1966 A.S.C.S. elections, which affect the determination of who shall administer the cotton and other A.S.C.S. programs in Dallas County. On or about November 16, 1966, Plaintiff W. BLOCTON was told by Defendant MINTER that he and others would not be permitted to remain on the land because Plaintiff W. BLOCTON and others had participated in the *Brown et al.* v. *U.S.A. et al.* lawsuit.

20. Plaintiffs BARLOW and S. BLOCTON, who did not have leases, were ordered to "vacte by December 1, 1966." Plaintiffs W. BLOCTON, BROWN, GILCREST,

GREEN and MOORER were advised that their leases would not be renewed and would terminate on December 31, 1966.

21. All Plaintiffs are being denied by Defendant MINTER of the right to live on and work the land on the plantation of Defendant MINTER to punish and deter them from exercising their rights to participate in litigation involving the cotton program; to intimidate witnesses who traveled to Washington, D. C. to testify in the litigation involving the cotton program; and to punish and deter those who participated in and were candidates for A.S.C.S. office.

22. Upon information and belief, Defendant MINTER will utilize the provisions of Code of Ala. Tit. 31, Secs. 35 *et seq.* to recover alleged "Possession Wrongfully Withheld" by obtaining "a writ or process directed to the Sheriff or his Deputy or any lawful constable in the County where the land lies" to remove Plaintiffs from the land.

23. At all times hereinbefore mentioned Defendant MINTER acted and will act under color of the statutes, ordinances, customs, regulations or usage of Dallas County and the State of Alabama.

24. The actions of Defendant MINTER hereinbefore described deprive and will deprive Plaintiffs and those similarly situated of their rights, privileges and immunities secured by the Constitution of the United States, specifically their rights under Article III, the First, Fifth and Fourteenth Amendments thereto, and the laws of the United States, including the Civil Rights Act of 1964.

25. These Plaintiffs sue on their own behalf of all other similarly situated Negro tenant farmers and sharecroppers who are being removed from their land to punish and intimidate them from participating in litigation and seeking office in connection with the cotton program of the United States Department of Agriculture. This class is so numerous as to make joinder impracticable. There are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class and the representative parties fairly and adequately protect the interests of the class.

26. Plaintiffs show that this is a proceeding wherein they seek an injunction restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert with him from taking any action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER from their homes on the Minter plantation until the hearing and determination of the prayer for permanent relief. There is between the parties an actual controversy as hereinbefore set forth. The Plaintiffs and others similarly situated and affected on whose behalf this suit is brought are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of.

27. Plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for injunction. Any other remedy to which Plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the Plaintiffs and those similarly situated.

WHEREFORE, Plaintiffs on behalf of themselves and those they represent and all others similarly situated pray that this Court:

a. Assume jurisdiction in this matter;

b. Enter judgment declaring that:

the Assignment Regulation is invalid and unauthorized by law on the grounds that it is in excess of the statutory authority of the Food and Agriculture Act of 1965

c. Issue a Preliminary Injunction:

enjoining and restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert with him from taking action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and

MOORER from their homes on the Minter plantation until the hearing and determination of the prayer for permanent relief, and compelling Defendant MINTER, his agents, representatives, attorneys, and all others acting in concert or participation with him to restore to the land any of these Plaintiffs or those similarly situated who have been removed from their homes on the Minter plantation.

d. Issue a Permanent Injunction:

(1) enjoining and restraining Defendants COLLINS, GODFREY and FREEMAN, their agents, representatives, attorneys and all others acting in concert or participation with them from enforcing or permitting the use of the Assignment Regulation filed February 16, 1966 and making any payments thereunder;

(2) enjoining and restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him from taking any action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER and those similarly situated from their homes on the Minter plantation and compelling Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him to restore to the land any of these Plaintiffs or those similarly situated who have been removed from their homes on the Minter plantation;

(3) compelling Defendant MINTER to negotiate leases for the year 1967 with Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER and those similarly situated to live on and work the land on the Minter plantation previously worked by these Plaintiffs upon terms comparable to those negotiated by Defendant MINTER with his other tenants.

e. Enter judgment in favor of Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, HALE and WILLIAMS and those similarly situated against Defendant MINTER

for the sum or sums of money paid by the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture under the Food and Agriculture Act of 1965 to Defendant MINTER, which money would have been paid to or for Plaintiffs and those similarly situated had Defendant MINTER not illegally denied these Plaintiffs and those similarly situated the ability to work the land on the Minter plantation.

f. And grant such other and further relief as may be proper and necessary.

Dated: December 2, 1966

/s/ DONALD A. JELINEK
DONALD A. JELINEK
Lawyers Constitutional
Defense Committee
31½ Franklin Street
Selma, Alabama

ALVIN J. BRONSTEIN
Lawyers Constitutional
Defense Committee
603 North Farish Street
Jackson, Mississippi

Attorneys for Plaintiffs

VERIFICATION

STATE OF ALABAMA
COUNTY OF DALLAS

I, CLEMON BARLOW, of lawful age, first duly sworn upon oath, depose and say:

That I am one of the Plaintiffs in the action herein;

That I have read the annexed Complaint and know the contents thereof; and

That the matters set out in said Complaint are true and correct to the best of my knowledge, information and belief.

/s/ CLEMON BARLOW

Sworn to and subscribed before me
this 1st day of December, 1966.

/s/ JAMES H. SULLIVAN
Notary Public
My Commission expires: June 11, 1968

IN THE UNITED STATES DISTRICT COURT

MOTION FOR A PRELIMINARY INJUNCTION— Filed December 2, 1966

Please take notice that upon the Complaint herein, Plaintiffs will move this Court at a date and time to be determined by the Court for an Order granting Plaintiffs a Preliminary Injunction

> enjoining and restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him from taking any action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER from their homes on the Minter plantation until the hearing and determination of the prayer for permanent relief and compelling Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him to restore to the land any of these Plaintiffs or those similarly situated who have been removed from their homes on the Minter plantation.

and for such other and further relief as may seem just and proper.

Date: December 2, 1966

/s/ DONALD A. JELINEK
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603 North Farish Street
Jackson, Mississippi

Attorneys for Plaintiffs

• • • •

IN THE UNITED STATES DISTRICT COURT

ORDER—December 14, 1966

Upon consideration of the motion of the plaintiffs filed herein on December 13, 1966, seeking substitution of the Honorable Charles S. Conley as counsel of record in lieu of those attorneys heretofore designated, it is

ORDERED that said motion be and the same is hereby granted.

Done, this the 14th day of December, 1966.

FRANK M. JOHNSON, JR.
Chief Judge

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE COMPLAINT AS TO DEFENDANTS COLLINS, GODFREY AND FREEMAN—Filed February 1, 1967

Defendants B. L. Collins, Horace Godfrey and Orville L. Freeman, by their undersigned attorneys, respectfully move the court to dismiss the complaint as to them, on the grounds that:

I. The court lacks jurisdiction of the subject matter with respect to said defendants in that plaintiffs lack standing to sue.

II. The complaint fails to state a claim upon which relief can be granted against said defendants, since the challenged regulations of the Department of Agriculture are consistent with statutory authority, and are neither arbitrary nor capricious.

III. The action is an unconsented suit against the United States.

IV. The court lacks personal jurisdiction over indispensable parties, defendants Godfrey and Freeman.

The court is respectfully referred to the attached Memorandum In Support of Defendants' Motion To Dismiss The Complaint etc., in support of this motion.

Respectfully submitted,

/s/ BAREFOOT SANDERS
Assistant Attorney General

/s/ BEN HARDEMAN
United States Attorney

/s/ HARLAND F. LEATHERS
/s/ MICHAEL R. LEMOV
Attorneys, Department of Justice

Attorneys for Defendants
Collins, Godfrey and Freeman

[Certificate of Service (Omitted in Printing)]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AS TO DEFENDANTS COLLINS, GODFREY AND FREEMAN—Filed February 1, 1967

STATEMENT

Plaintiffs in this action, seek a declaratory judgment that certain amended regulations adopted by the Department of Agriculture[1] are invalid and unauthorized by statute. The regulations in question govern assignments by farmers of subsidy payments under the Upland Cot-

[1] 7 C.F.R. 709 *et seq.* "Assignment of Payment", as amended at 31 F.R. 2815, February 17, 1966.

ton Program and other federal agricultural programs. Plaintiffs further seek to enjoin the defendant federal officials from permitting assignments pursuant to the amended regulations or making subsidy payments pursuant to assignments already made.

The relief requested would, in effect, require said defendants to prohibit assignments by tenant farmers to their landlords to secure payment of rent for land used "to finance making a crop," but would not affect identical assignments to secure payment for supplies, equipment, food, clothing, or soil or water conservation practices, etc., also used "to finance making a crop."

Plaintiffs are tenant farmers who allege they sue on behalf of themselves and all others "similarly situated." Defendants are the Secretary of Agriculture, two officials of the Department of Agriculture and plaintiff's landlord.

THE COMPLAINT

Plaintiffs first claim against the defendant federal officials alleges that defendant Orville L. Freeman, as Secretary of Agriculture, is authorized by law to promulgate regulations pursuant to the Food and Agriculture Act of 1965. (Complaint, paragraph 4(c)) The complaint further alleges that Federal subsidy payments to cotton farmers are provided for by the Act; that partial payments may be made in advance and that payments pursuant to the Act may be assigned. (Complaint, paragraphs 5, 6) The complaint further alleges that pursuant to the statute assignments of payments may be made "as security for cash or advances to finance making a crop * * *." It alleges that the Assignment of Payment regulations (7 C.F.R. 709, et seq., as amended) allow assignment of payments as security to finance "payment of cash rent for land used" in the making of a crop (Complaint, paragraph 7) and that plaintiffs were required to enter into such security arrangements by their landlord. (Complaint, paragraph 10)

It is alleged that assignments for cash rent "in no way" finance making a crop; that prior regulations of the Department of Agriculture prohibited assignments as

security for rent; that said prior regulations "evinced the intent of the legislature" and that the amended regulations are "unauthorized by law." (Complaint, paragraphs 6(c), 8)

Plaintiffs second claim, against the defendant J. A. Minter, Jr., only, alleges that said defendant acted to improperly deprive plaintiffs of their right to receive subsidy payments under the Act. Plaintiffs third claim, against the defendant Minter only, alleges that certain of the plaintiffs have illegally been ordered to vacate defendant's premises because of their participation in litigation with respect to the Cotton program and, in the case of Plaintiff W. Blocton, because of his candidacy for A.S.C.S. County Committeeman.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in this action:

Section 103(d)(13) of the Food and Agriculture Act of 1965; 7 U.S.C. Sec. 1444(d)(13):

> The provisions of Subsection 8(g) of the Soil Conservation and Domestic Allotment Act, as amended (relating to assignment of payments), shall also apply to payments under this subsection.

Section 8(g) of the Soil Conservation and Domestic Allotment Act; 16 U.S.C. Sec. 590h(g):

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop, *handling or marketing an agricultural commodity, or performing a conservation practice.* Such assignment shall be signed by the farmer and witnessed by a member of the county committee * * * Such assignment shall be filed with the county committee. Such assignment shall not be made to pay or secure any preexisting indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary or any

disbursing agent if payment to the farmer is made without regard to the existence of any such assignment. *The Secretary shall prescribe such regulations as he determines necessary to carry out the provisions of this subsection.*[2]

7 C.F.R. Sec. 709.2 (as amended at 31 F.R. 2815, February 17, 1966):

A payment which may be made to a farmer (referred to in this part as the "assignor") under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advance to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor; (b) to provide food, clothing, and other necessities required by the assignor, or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm.

ARGUMENT

I

The Court Lacks Jurisdiction Over the Subject Matter of Plaintiffs Claim Against the Defendant Federal Officials in That No Legally Protected Interest of Plaintiffs Has Been Invaded and Plaintiffs Thus Lack Standing to Sue

Plaintiffs' dispute is not properly with the defendants, Collins, Godfrey and Freeman but with their landlord.

---

[2] The italicized language was added by Public Law 89-742, 89th Congress, November 2, 1966.

Defendants Collins, Godfrey and Freeman have not taken any action which directly invades any legally protected interest of the plaintiffs. For a plaintiff to have judicial standing to challenge administrative action it must be demonstrated that a "legally protected interest" is invaded by such administrative action:

> "In a suit in a Federal court by a citizen against a Government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no judicial 'controversy,' without which, under Article III, Section 2, of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a 'recognized' character at 'commonlaw' or a substantive private legally protected interest created by statute * * *." *Associated Industries* v. *Ickes*, 134 F.2d 694, 700 (2d Cir., 1943) cert. granted 319 U.S. 739 vacated as moot 320 U.S. 707.

Unless plaintiffs can demonstrate that some contract or property right has been directly invaded by the challenged regulation, or unless the right to sue is conferred by statute they lack standing to sue:

> "A litigant ordinarily has standing to challenge governmental action of a sort, that, if taken by a private person, would create a right of action cognizable by the courts * * * Or standing may be based on an interest created by the Constitution or a statute * * * But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially." *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 152 (1950), concurring opinion of Frankfurter, J.

See also, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479 (1938); *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *Rural Electrification Adm.* v. *Central Louisiana*

Elec. Co., 354 F.2d 859 (5th Cir., 1966) cert. den., October 11, 1966.

Plaintiffs in this action can demonstrate neither (1) a legally protected interest nor, (2) direct invasion of any interest.

The Assignment of Payment regulations permit a landlord and tenant to agree to an assignment of program benefits as security for the payment of cash rent by the tenant. Whether or not such assignment is requested or agreed to, does not affect plaintiffs' right to participate in the subsidy program in question,[3] or their right to benefits. Such assignments, if made, are the subject of economic bargaining between plaintiffs and their landlord. Clearly, plaintiffs have no commonlaw right to prohibit their landlords from requesting such terms in contracts. Neither may they require defendants to prohibit such contractual arrangements. Nor is there any statutory basis for such prohibition.

In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1939), the Supreme Court held that a litigant has no standing to assert that a Government official had misinterpreted his instructions in requiring a particular clause to be included in a contract:

> "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation." *Perkins* v. *Lukens Steel Co.*, supra, 129.

Unlike *Perkins*, the regulation involved in this action does not *require* the inclusion of a contract term. And the contracts involved in this action are between two private parties not with the United States as in *Perkins*. The *Perkins* decision requires the conclusion that plaintiffs in this action have no legal right to limit arms-length bargaining. See also: *Johnson* v. *Redevelopment Agency*, 317 F.2d 872 (9th Cir., 1963), *cert. denied* 375 U.S. 915, holding that residents of an urban renewal area, who were not parties to a contract between the local renewal agency and the United States, were with-

[3] The Upland Cotton Program, 7 U.S.C. 1341, *et seq.*

out standing to enforce the conditions of the contract; *Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217 (D.C. Cir., 1964), *cert. denied* 379 U.S. 826, holding that a labor organization and individual workers lacked standing to challenge the administrative interpretation of immigration statutes allowing aliens to enter the United States.

In addition to plaintiffs' failure to demonstrate a legally protected interest in this action, they have failed to demonstrate that *any* interest of theirs has been invaded by the action of the defendants. The regulations challenged are permissive and not mandatory. They do not require the parties to leases to agree to assignments as security for the rent. Prior to their amendment the regulations permitted assignments to secure payment for equipment, clothes, fertilizer, etc. The amended regulation adds rent to this list of items. Since it is permissive and not mandatory it "does not represent exercise * * * of regulatory power over private business or employment." *Perkins* v. *Lukens Steel Co., supra*, 128.

Plaintiffs' rights are no way "invaded" since the regulation does not compel them to do anything. As stated by the Supreme Court in *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1922):

> "The State of Massachusetts * * * complains that the Act in question invades the local concerns of the State * * * Probably it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject * * * nor does the statute require the state to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

The gravamen of plaintiffs' complaint is actually that the amended regulation permits another person to obtain an economic advantage over them. Such a complaint is no different than that of the plaintiff-competitors in *Ala-*

bama Power Co. v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939) and similar cases. In neither situation is there standing to sue the Government. As stated by the Court of Appeals for the District of Columbia:

> "The defendants have not undertaken to regulate (plaintiffs) in any way. They have not been ordered to abandon any of their activities or to forego the expansion programs planned by them. They have not been subjected to any obligation or duty. Their sole interest and objective is to eliminate the competition which they fear." *Kansas City Power and Light Company* v. *McKay*, 225 F.2d 924, 928 (D.C. Cir., 1955), *cert. denied* 350 U.S. 884.

Since plaintiffs have failed to demonstrate a *legally protected interest* which has been *invaded* by the action of the defendant federal officials, they lack standing to maintain this action and the complaint should be dismissed as against these defendants.

II

The Regulations of the Department of Agriculture Involved Herein Are Consistent With Statutory Authority and Neither Arbitrary Nor Capricious and May Not Be Invalidated in This Action

The Assignment of Payment regulations, 7 C.F.R. 709, *et seq.*, are duly promulgated and adopted regulations of the Department of Agriculture. As such they are presumed to be valid and the burden of proving their invalidity is on the plaintiffs in this action. *United States* v. *Obermier*, 186 F.2d 243, 247 (2d Cir., 1960), *cert. denied* 340 U.S. 951; *United States* v. *Watkins*, 173 F.2d 599 (2d Cir., 1949), *aff'd* 338 U.S. 537.

> "Regulations having been duly adopted, the burden is on one who questions them to show their invalidity. *Montana Eastern Ltd.* v. *United States*, 9th Cir., 95 F.2d 897. And this burden can be carried only by showing as a minimum that the regulations are inconsistent with the underlying statute or are unrea-

> sonable or inappropriate. *United States* v. *Morehead*, 243 U.S. 607, 37 S. Ct. 458, 61 L. Ed. 926; *Boske* v. *Comingore*, 177 U.S. 459, 20 S.Ct. 701, 44 L. Ed. 846." *United States* v. *Watkins, supra*, 603.

The Court of Appeals for the Fifth Circuit has held that the scope of judicial review of such regulations is limited:

> "We must assume that even if we disagree with this decision of the Commission that these expenditures should be assigned to Account 538, that disagreement would not of itself warrant our setting aside the Commission's determination. 'It is a fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence."' *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112, 67 S.Ct. 133, 91 L. Ed. 103. *Southwestern Electric Power Co.* v. *Federal Power Commission*, 304 F.2d 29, 42 (5th Cir., 1962).

See also: *American Tel. and Tel. Co.* v. *U.S.*, 299 U.S. 232, 236 (1936); *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125, 146 (1938); *Garelick Mfg. Co.* v. *Dillon*, 313 F.2d 899 (D.C. Cir., 1963); *Gray* v. *Powell*, 314 U.S. 402, 411 (1941); Davis, *Administrative Law*, Section 30.10.

The Food and Agriculture Act of 1965 authorizes assignment of benefits in the following language:[4]

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing, as security for cash or advances to *finance making a crop* * * * (Emphasis added.)

The words "to finance making a crop" are not defined in the statute. On its face, the statutory language authorizes assignments as security for any form of cash or

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[4] The text quoted is 16 U.S.C. 590h(g). That section is made applicable to the Upland Cotton Program by 7 U.S.C. 1444(d)(13), Section 402(d)(13) of the Food and Agriculture Act of 1965.

advance which is an element of the process of producing a cotton crop.

The challenged regulation, as amended, defined the words "to finance making a crop" as follows:

> a) To finance the planting, cultivating or harvesting of a crop, including the purchase of equipment required therefor *and the payment of cash rent for land used therefor;* (b) To provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) To finance the carrying out of soil or water conservation practices. (Emphasis added.)

Plaintiffs allege that the italicized words allowing an assignment as security for the payment of rent for land used in "making a crop" are unauthorized by the statute.[5] Yet the statute does not impose any limitation on assignments which finance "making a crop". No aspect of the process of making a crop is expressly excluded. Land, like labor and equipment, is essential to making a crop. The regulations challenged are reasonable and consistent with the statute. See *Cargo Carriers* v. *Snyder*, 104 F. Supp. 258 (D.C.D.C. 1952), affirmed 206 F.2d 488 (D.C. Cir., 1953), holding that the Coast Guard could properly define the statutory term "vessel" to include a tugboat and barge which operated as a unit.[6]

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[5] The complaint apparently demands judgment declaring the entire February 1966 amendment invalid. However, the complaint does not allege that plaintiffs were affected by the balance of the 1966 amendment, modifying Section 709.4, to allow deduction of interest, not in excess of the maximum rate chargeable under state law, in advance. No interest is provided for with respect to the rent or assignments involved herein.

[6] See also, *Hammond* v. *Hull*, 131 F.2d 23, 25 (D.C. Cir., 1942):

> * * * When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interefered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious.

See also, *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 11, 131 (1943):

> * * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administer-

Nor are the regulations, as amended, arbitrary or capricious. The amendment of February 1966 recognized that credit arrangements for the rental of farm land are a widely used and accepted contractual arrangement in modern farming. The amendment has particular applicability to the Upland Cotton Program. The Food and Agriculture Act of 1965 reduced the basic loan rate for cotton from the 1965 level of 29 cents per pound to 21 cents per pound for the 1966 crop and also reduced the acreage which might be planted. 7 U.S.C. 1444(d). This reduction in the value of the cotton crop reduced commensurately the value of cotton as security for rent payments. The amendment thus recognizes an additional form of security for rent and will, in many cases, aid farmers in plaintiffs' position to secure financing where they otherwise might not be able to do so.

In any event, the wisdom of such a regulation is a matter which has been committed to the expertise of the Secretary of Agriculture. The Court should not substitute its judgment for that of the officials who administer the program:

> The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in Board of Trade v. United States, 314 U.S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legis-

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ing the statute must determine it initially, the reviewing court's function is limited. * * *

lative authority and to the Commission for its exercise. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943).

The regulations in question are consistent with the statute and neither arbitrary nor capricious and should not be invalidated by the Court.

III

The Action Is An Unconsented Suit Against the United States

Plaintiffs, in their first claim, seek to set aside a duly promulgated regulation of the Department of Agriculture and compel officers of the United States not to honor assignments made thereunder. With respect to such relief the action is one against the United States regardless of the defendants named:

> "* * * the general rule is that a suit is against the sovereign if 'the judgment sought would extend itself on the public Treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be to 'restrain the Government from acting or to compel it to act.' Larson v. Domestic and Foreign Corp., supra, (337 U.S. 682 (1949) at 704; ex parte N.Y., 256 U.S. 490, 502 (1921). * * *" *Dugan* v. *Rank*, 372 U.S. 609, 620.

The relief demanded against defendants Collins, Godfrey and Freeman would "interfere with the public administration" and "restrain the Government" from implementing a major federal program. Since the regulations in question are fully authorized by the Statute (See Section II, supra) the rule of sovereign immunity bars such a claim:

> "* * * it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel

it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 702 (1949).

Plaintiffs cite no express statutory consent of the United States to the relief sought in this action against the defendant federal officials, and the complaint must therefore be dismissed.

IV

The Court Lacks Personal Jurisdiction Over Indispensable Parties, Defendants Godfrey and Freeman

Defendants Godfrey and Freeman have not been personally served with process in this action within the territorial limits of the State of Alabama as required by Rule 4(f) F.R.C.P. Extra-territorial service of process is available only where "each defendant" is a federal officer, see 28 U.S.C. 1391(e), which is not the case in this action.

Defendants Freeman, Secretary of Agriculture and Godfrey, Administrator of the Agricultural Stabilization and Conversation Service of the Department of Agriculture are indispensable parties in this action since plaintiffs seek to invalidate a departmental regulation and enjoin payment of federal funds pursuant thereto. *Stroud* v. *Benson*, 254 F.2d 448 (4th Cir., 1958); *Lazar* v. *Benson*, 156 F. Supp. 259 (E.D.S.C., 1957).

Furthermore, venue of the action is improper since it may be brought only in the judicial district where all defendants reside. See 28 U.S.C. 1391(b). Defendants Godfrey and Freeman are residents of the District of Columbia. *Stroud* v. *Benson, supra; Ernst* v. *Secretary of Interior*, 244 F.2d 344 (9th Cir., 1957).

Since the court lacks jurisdiction over indispensable parties and since venue is improper, the complaint must be dismissed against the defendant federal officials.

CONCLUSION

Defendants' motion to dismiss the complaint as to defendants Collins, Godfrey and Freeman should be granted.

Respectfully submitted,

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Assistant Attorney General

/s/ BEN HARDEMAN
United States Attorney

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IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS FREEMAN, GODFREY AND COLLINS
—Filed February 20, 1967

Defendant Freeman, Secretary of Agriculture; defendant Godfrey, Administrator of the Agricultural Stabilization and Conservation Service of the Department of Agriculture; and defendant Collins, Executive Director of the Alabama Agricultural Stabilization and Conservation Service, have jointly filed a Motion to Dismiss the complaint in the title cause on several grounds. This Motion to Dismiss necessarily goes only to the First Claim in the complaint (a challenge to the legality of certain Department of Agriculture regulations) since that is the only claim under which relief is sought against these defendants. The Second and Third Claims, which seek relief from Defendant Minter, are discussed in a separate memorandum.

Plaintiffs will show in this memorandum that each of the grounds for dismissal pressed by defendants is unfounded. Three of defendants' grounds are attempts to raise technical procedural rules to avoid a judgment of plaintiffs' challenge on the merits. These procedural claims will be discussed at the end of this memorandum. The only question raised on the merits, that of the statutory authority for the challenged regulations, is the most important question in this case and deserves discussion first.

I.

The Challenged Regulation Is Invalid and Unauthorized By Law in That It Exceeds the Statutory Authority Given to Defendants.

A. *Background*

This case involves the assignment by poor tenant farmers of land diversion payments authorized to be made to them by Section 402(a) of the Food and Agriculture Act of 1965, 7 USC Sec. 1444(d)(13). The Food and Agriculture Act of 1965 is omnibus legislation which, *inter alia*, establishes price support levels and soil diversion payments for various crop programs. Section 1444(d) prescribes price support and diversion payments for the upland cotton program for the 1966 and three subsequent crop years. To be a beneficiary of the program, a farmer must "be a producer on whose farm the acreage planted to the commodity does not exceed the farm acreage allotment for the commodity . . ." (7 USC Sec. 1428(b)) The acreage diversion payments in the case of the production of upland cotton are specifically prescribed by 7 USC Sec. 1444(b)(4) for farmers who divert "a portion of their cotton acreage allotment from the production of cotton to approved conservation practices to the extent prescribed by the Secretary. . ." Thus a farmer, whether a small tenant farmer or a landowner, has a right to receive payments in accord with his diversion of land to approved conservation use.

Diversion payments, like acreage allotments, are administered on the local level by the Agricultural Stabiliza-

tion and Conservation Service (ASCS). 7 USC Secs. 1421(a), 1444(d); 16 USC Sec. 590h(b). The local administrative unit is usually the county. See 16 USC Sec. 590h(b). The county ASC committee is specifically authorized to process and enforce the assignment of diversion payments when assignment is made for certain prescribed purposes. 7 CFR Pt 709. If an assignment is not made for proper purposes and in conformity with the procedure prescribed, the diversion payment is made directly to the producer-assignor. If the assignment is properly made, however, it is recorded with the county committee and the federal agency and the payment is made directly to the assignee to the extent of the assignment.

The crucial issue in this case is the scope of purposes for which assignment of a diversion payment under the upland cotton program may properly be made. In particular, *the issue is whether assignment may be made to secure an obligation to pay rent.* The answer to this question lies in the interpretation of 7 USC Sec. 1444(d)(13) and 16 USC Sec. 590h(g) which together establish a "spendthrift trust" sort of rule which places very strict limits on assignments.

7 USC Sec. 1444(d)(13), a provision under the upland cotton program enacted in 1965, provides that:

> The provisions of section 590h(g) of title 16 (relating to the assignment of payments), shall also apply to payments under this [program].

Turning to the "provisions of 16 USC Sec. 590h(g), we find:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances *to finance making a crop. . .* (Emphasis added.)

The key phrase in this statute, "to finance making a crop", had been carefully defined by the Department of Agriculture in 1965 when Congress adopted the upland cotton program. The Department's regulations under Sec. 590h(g) had since 1955 read:

> . . . To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. *Nothing contained herein shall be construed to authorize an assignment given to secure* the payment of the whole or any part of the purchase price of a farm or *the payment of the whole or any part of a cash or fixed commodity rent for a farm.* 7 C.F.R. Sec. 709.2, promulgated in 20 Fed. Reg. 6511 (1955).

Thus, at the time the upland cotton program was enacted, the issue in this case was crystal clear. Diversion payments could not be assigned to secured (sic) farm rent obligations.

In the spring of 1966, however, the Department of Agriculture made a dramatic about-face. The prohibition of assignments for cash rent was deleted and instead the definition of "making a crop" was expanded to include:

> the payment of cash rent for land used (for planting, cultivating or harvesting) 31 Fed. Reg. 2815 (1966)

This about-face in the regulations has a very substantial adverse impact on a tenant farmer's relationship with his landlord. The tenant's right to a diversion payment is likely to be his sole means of security for borrowing purposes. When that security is taken up by the landlord for rent, then the tenant's borrowing power is destroyed. He has no choice but to turn to the same landlord, who in the normal case conveniently operates a feed and supply store, for his seed fertilizer and necessities to get through the year. Thus the landlord maintains complete financial domination over the tenant. Those tenants who attempt to assert their independence and refuse to make an assignment can be turned off the land as happened to several plaintiffs in this case.

There was absolutely no statutory authority for the Department of Agriculture's dramatic about-face in 1966 from its longstanding interpretation of "making a crop".

This change is contrary to commonly understood definitions of "making a crop". It is contrary to the legislative history of the statutes involved and to the spirit and purpose of those statutes. This 1966 change in the regulation should be struck down as in excess of statutory authority.

B. *A Regulation which Is in Excess of Statutory Authority is Invalid.*

The question herein is whether Congress intended in the enactment of the Food and Agriculture Act of 1965 to authorize the Secretary to promulgate regulations providing for the assignment of diversion payments to secure payment of cash rent for land to be used in producing a crop. Ascertainment of Congressional intent focusses on the question what Congress meant by the phrase "to finance making a crop." Congress used this phrase to limit the Secretary's authorization in the upland cotton program by making 16 USC Sec. 590h(g) applicable to that program. Therefore unless the payment of cash rent for agricultural land is within the Congressional intendment of "making a crop", the Secretary's amendment of the regulation cannot stand.

The Secretary, in administering the upland cotton program, must act within the limits of his statutory authorization. He cannot issue regulations applying the terms of the statute that exceed the limits of his authority. *Miller* v. *United States*, 249 U.S. 435, 440 (1935); *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). The extent of his authority is necessarily a matter for the determination of the court, not of the administrator himself. *Addison* v. *Holly Hill Fruit Co.*, 322 U. S. 607, 616 (1944).

The Secretary's interpretation of statutory language at any time is not conclusive, though of course it has weight in judicial consideration. The weight depends, as the Court by Mr. Justice Frankfurter has said, on the generality or specificity of the statutory authorization:

> The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is

> called, its details. But when Congress wants to give wide discretion it uses broad language. *Addison* v. *Holly Hill Fruit Co., supra* at 616.

Congress has created many agencies invested with broad policy-making functions and imposed upon them such discretionary guides as "the public interest, convenience and necessity" and what is "just and reasonable." See *Federal Radion Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933); *Tagg Brothers & Moorhead* v. *United States*, 280 U.S. 420 (1930); 1 DAVIS, ADMINISTRATIVE LAW Sec. 2.03 (1958). Such agencies are required to hold hearings in specific applications of the statute and to consider public comments in the discharge of their policy-making function. See *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir., 1966); 1 DAVIS, *id.* Sec. 7.01. This close, regular attention to the subject of the regulation is in part the reason for judicial deference to administrative expertise. See, e.g., *NLRB* v. *Hearst Publications*, 322 U.S. 111 (1943).

But neither the Department of Agriculture nor the Commodity Credit Corporation is such an agency. As we shall show *infra*, the statutory term "making a crop" is a technical term of narrow signification. It is not the term which Congress would have chosen to authorize the Secretary to make and revise policy discretionarily on the assignability of price support and diversion payments. The Department of Agriculture does not hold hearings on the question of need for extension of the right of assignment. Nor is the statutory term in question here a phrase of merely common English usage which would be susceptible of many variations in application. Compare *Cargo Carriers* v. *Snyder*, 104 F.2d 258 (D.D. C. 1952), where the court upheld a determination by the Secretary of the Treasury that a peculiar towboat and barge, when used in combination, were a "vessel" for purposes of compliance with safety reuirements administered by the Coast Guard. There the finding of broad Congressional delegation was dictated by the use of ordinary words in relation to the practical safety purposes of the legislation.

If, as we shall show, on the basis of the meaning of the phrase, Congressional adoption of the administrative interpretation, and Congressional intent, the Secretary's amendment is unauthorized, then the court must strike it down.

C. *Definitional Meaning of "Making a Crop"*

The phrase "to make a crop", though it is simple English, may not be dismissed as a colloquial expression of "to grow a crop." The phrase has a considerable history of narrower, technical usage, which appears in the dictionary definitions.

This usage, like that of all words, has of course not been perfectly constant. Originally, in its English usage, the phrase meant to prepare a crop for use or storage at the last stage of development. So, "to make hay" meant to turn cut hay for drying by the sun in the field. *Oxford English Dictionary* M-64 (1908). The judicial construction of the term confirms this usage.

In *Texas & Pac. Ry. Co.* v. *Bayliss*, 62 Tex. 570 (Sup. Tex. 1884), where the court considered the measure of damages for the destruction of growing crops, the court said:

> The meaning of the word *make*, when used in relation to a crop, is as well understood as any other word in our language. It means "produce at maturity."
>
> A growing crop is not *made* but in the process of being made; . . .
>
> To adopt the construction of appellee, we should have to hold the expression "would have made" to be equivalent to the words "had growing upon it", which is quite a different thing, as anyone accustomed to cultivating crops would testify. * * *
>
> . . . The word *make* is hardly so comprehensive in signification as the word 'produce', being ordinarily limited to production at maturity.
>
> Id. at 574 (Emphasis in original.)"

See also *Driver* v. *Maxwell*, 56 Ga. 11 (Sup. Ct. Ga. 1876), where a member of the court stated: "To make, means to

gather and house, to fit it for use or market." *Id.* at 20 (Dissenting opinion).

There is some more recent authority for a somewhat broader usage. The *Dictionary of Agricultural and Allied Terminology*, at 643, gives this definition:

> To plow and fit land, to plant send, to cultivate, to harvest, etc.

Although this usage comprehends an earlier stage in the process of growing the crop, it clearly derives from the other definitions and is likewise limited by its focus on the actual labor and work involved in growing. In all usages, the term deals with the farmer in the field growing his crop, not negotiating for his farm.

The assignment regulations, as originally adopted and as in force at the time of the enactment of the 1965 Act, reflected the last-stated usage of the term "to make a crop." The Secretary apparently adopted the broadest construction which he thought the language permitted. The regulation plainly respects the bounds of the technical usage. It read, as we will recall:

> . . . To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required—therefore; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. 20 Fed. Reg. 6511 (1955)

Both (a) and (b) are necessary functions of the ongoing process of growing the crop.

(a) Planting, cultivating and harvesting of the crop are clearly within the definition. The purchase of equipment is included insofar as it is "required" for planting, cultivating or harvesting.

(b) The provision of necessities for the farmer's family is an expense of labor, which is within the contemplation of the phrase. The family's closeness to the farm during this time, their working together on it and their personal dependence on credit explain the relevance of the provi-

sion of necessities to an assignment to finance making a crop.

(c) The inclusion of "soil and water conservation practices" finds justification in the purposes of the act as a conservation and production—adjustment measure rather than in the language itself. This provision is therefore irrelevant to the validity of the amendment.

The Secretary's 1966 amdnement directly reversed his construction of the statutory language on a major point of substance. Since before the amendment the regulation reflected the broadest possible definition of "making a crop," the amended regulation exceeded the definition.

When statutory language is technical, then the technically authoritative meaning given that language is the best guide to legislative intent. *O'Hara* v. *Luckenbach Steamship Company*, 269 U.S. 364, 371 (1926); *Carter* v. *Liquid Carbonic Pacific Corp.*, 97 F. 2d 1, 3 (9th Cir. 1938). Absent technical significance, words are to be given their ordinary meaning, which may be found by reference to an appropriate dictionary. *Powell* v. *United States*, 60 F. Supp. 433, 439 (E.D. Va. 1945), *affirmed* 152 F. 2d 228 (5th Cir. 1945), *affirmed* 330 U.S. 238 (1947). Reliance on dictionary definition is peculiarly appropriate when the definition reveals a specialized usage in the industry which provides the statutory context.

On the basis of Congressional intent as evidenced by the definitions stated above, therefore, the statute does not authorize the Secretary's assignment regulations amendment.

D. *Congressional Adoption of Administration Construction Excluding Rent.*

It is dispositive of the question of Congressional intent as to the meaning of "making a crop" that at the time of the enactment of the Food and Agricultural Act of 1965 there was in effect a regulation which unequivocally and emphatically expressed the view of the Secretary on the question. The regulation had been in effect for ten years prior to the passage of the Act, and during that time the Secretary's construction unvaryingly had been

that assignments to secure cash rent payments were unauthorized. It follows from a basic principle of statutory construction that Congress recognized, approved and adopted this construction by enacting in another context the language in question.

The principle is that legislators are presumed to know the construction placed upon a statute by its administrators and that reenactment of the statute affirms the administrative construction. Thus in *Wyoming* v. *United States*, 310 F. 2d 566 (10th Cir. 1962), the court said:

> When Congress passed the Resurvey Act of 1908, it must be presumed to have known of the construction which had been placed on the Resurvey Acts of 1903 and 1905 and the effect given to such earlier acts by the Department of the Interior and the practice and procedures followed and carried out by such Department . . . Therefore, when Congress enacted the Resurvey Act of 1908, without substantial change in any relevant part, it manifested its approval and ratification of the administrative construction of the earlier Resurvey Acts by the Department . . . *Id.* at 580.

Accord, *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920). See *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *Cammareno* v. *United States*, 358 U.S. 498 (1959); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

This principle is particularly relevant where, as here, Congress does not bother to repeat statutory language but rather expressly adopts and incorporates another definition by reference. In the Food and Agriculture Act of 1965, instead of authorizing in terms the assignments of payments, Congress tersely made "the provisions of Section 590h(g) of Title 16 . . . apply to payments under this subsection." 7 USC Sec. 1444(d)(13). This cursory treatment evinces rare confidence in the clarity and settled character of statutory "provisions." The use of such an indefinite term as "provisions" to refer to as cryptic a statute as 16 USC Sec. 590h(g) implicitly recognizes that its provisions were spelled out in regulations. Had Congress meant to authorize the Secretary to begin again,

and to give the assignment right in the upland cotton program a life of its own, independent of the history of Section 590h(g), Congress would have spoken in absolute terms. The drafting of Section 1444 (d)(13) therefore establishes a clear Congressional understanding that "making a crop" did not include payment of rent.*

E. *Spirit and Purpose of Assignment Restrictions*

The legislative history of the "making a crop" limitation on the assignment of payments, from its origin in the Soil Conservation and Domestic Allotment Act to its incorporation in the Food and Agriculture Act of 1965, shows that it was used in accord with the established definition and that it reflects a benevolent purpose toward small tenant farmers.

Section 8(g) of the Soil Conservation and Domestic Allotment Act, 16 USC Sec. 590h(g), (to which 7 U.S.C. Sec. 1444(d)(13) refers) was the statutory origin of the phrase "making a crop." The phrase came into the Soil Conservation and Domestic Allotment Act as an amendment by Section 103 of the Agricultural Adjustment Act of 1938. The conference report on this provision states in explanation only that:

> The assignment may be made only as security for cash or advances to finance making a crop. H. Rep. No. 1767, 75th Cong. 3d Sess. 60 (1938).

However, in the bill Section 103 was entitled "TENANT PROVISIONS" and also included a provision (Section 8

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* The reference of "making a crop" is made explicit again in the preparation of the 1965 Act. The conference report, in summarizing the provisions of the bill, states:

> Cotton farmers may assign their direct price support and diversion payments to *private lending agencies* in obtaining *production loans*. Confer. Rep. No. 1123, 89th Cong. 1st Sess. (1965 US Code Cong. & Admin. News 5966). (Emphasis supplied.)

"Production loans" are not loans for rent, and loans for rent are not usually made by private lending agencies. Thus the Congressional discussion surrounding the term "making a crop" evinces a meaning which does not include payment of rent.

(f) of the Soil Conservation and Domestic Allotment Act) prohibiting landlords from increasing their benefits by evicting, or changing their agreements with, tenants and sharecroppers. This Congressional concern for sharecroppers and tenants is carried over in the upland cotton program, which includes a provision requiring "adequate safeguards to protect the interests of tenants and sharecroppers." The problem of tenants and sharecroppers has troubled Congress throughout the agricultural subsidy area. Thus the committee report on a related program states:

> No single problem connected with the proposed soil bank program had caused the committee more concern than that of guaranteeing adequate protection of tenants and sharecroppers under the program.
>
> Conference Report on H.R. 12, Sec. 4 Cong. 2d Sess. 7

This understanding of Congressional intent comports fully with the clear Congressional policy to benefit and protect small tenant farmers and sharecroppers in the subject legislation. Congress, in enacting the assignment restrictions of the 1965 Act, was acting toward poorly educated tenants and sharecroppers with the same intentions that a father has when he inserts a "spend thrift" provision in a trust for his son. By providing a form of security to cotton tenant farmers, these restrictions were intended to benefit directly and primarily the assignor, not the assignee. If tenant farmers, who negotiate with their landlords from a position of inherent weakness, can be compelled to assign away their benefits for rent, no source of security would remain to them to finance purchases of fertilizer, food and other necessities.

The position of the Secretary is apparently that the regulation amendment is justified because it benefits landlord farmers because the costs of farming have increased and the price support loan rate has declined. With a stroke of the pen that authored the regulation amendment, the Secretary has shifted the burden of high costs to from landlord farmers to poor tenant farmers. The Secretary

is privileged to harbor good intention for landlord farmers. He cannot, however, substitute those good intentions for statutory authority and promulgate a regulation contrary to the meaning, intendment and policy of the Act.

II

Defendant's Procedural Grounds for Dismissal Have No Merit

For the foregoing reasons, plaintiffs believe that it is clear on the merits that the challenged assignment regulations are in excess of the Secretary's authority and should be struck down. However, in keeping with an unfortunate tendency on the part of administrative officials to seek to avoid judicial review of their actions on the merits by raising various technical procedural claims defendants have raised the procedural objection that (1) plaintiffs lack standing, (2) the action is an unconsented suit against the United States, and (3) that plaintiffs have failed to properly join indispensable parties. None of these claims has merit in the instant case.

A. *Plaintiffs Have Standing to Bring this Action*

The judicial rules which have evolved on the question of standing are not noted for their clarity or consistency. The standing doctrine has been developed in an attempt to assure that the party bringing a lawsuit is sufficiently and directly harmed to have an adequate interest in vigorously prosecuting his claim.

The harm to plaintiffs caused by the challenged regulations is very real and direct. The regulations are directed specifically to plaintiffs and others similarly situated. The damage to plaintiffs is not speculative or contingent. The regulations have produced economic pressure against plaintiffs which has hampered their farming activities. It has resulted in some cases in plaintiffs being forced off of land which they had farmed for decades. It has enabled landlords to demand assignment of the only substantial liquid asset possessed by plaintiffs and thus has precluded plaintiffs from obtaining credit anywhere except at the landlord's store.

Plaintiffs standing is based on the fact that the challenged regulations interfere with their contract rights *vis-a-vis* their landlords. The courts have recognized the existence of standing in many similar situations where governmental action has interfered with private contractual rights. In *City of Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77 (1958), the Court was presented with a situation where one Parmalee had had a contract for transportation services with various railroads in Chicago. The railroads discontinued the contract and entered into a new contract with Transfer. The City of Chicago then passed an ordinance requiring Transfer to obtain a certificate before operating. Transfer and the railroads successfully challenged the constitutionality of the ordinance in lower courts. Parmalee sought to appeal this decision as an intervening party. The ordinance did not of its own force grant or deny any rights to Parmalee. However, it did have an indirect effect on Parmalee's bargaining rights with the railroads. The Supreme Court held that this indirect effect on private bargaining rights was sufficient to give Parmalee standing.

> "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmalee has a direct and substantial personal interest in the outcome." 357 U.S. at 33.

In *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), the FCC had issued an order denying future licenses to radio stations with certain types of network affiliation contracts. The order was directed at stations, not at the networks. However, the Supreme Court held that the network had standing to challenge the order because it impinged on the network's contractual rights.

> "Appellants standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that . . . the regulations purport to operate to alter and affect adversely appellant's contractual rights

and business relations with station owners." 316 U.S. at 407.

Defendants have attempted to counter these clear authorities supporting plaintiffs standing by citing a group of cases which suggest that a plaintiff must show that his interest being invaded is "of a 'recognized' character at 'common law' or a substantive private legally protected interest created by statute." See Defendants' Memorandum, p. 4-5. Defendants find their principal support for their proposition in a District of Columbia Circuit Court of Appeals decision (*Associated Industries* v *Ickes*, 134 F. 2d 694, 700 (2d Cir. 1943), cert. granted, 319 U.S. 739, vacated as moot, 320 U.S. 707) and a concurring Supreme Court opinion. (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 152 (1950)) Defendants also rely tangentially on a few Supreme Court majority opinions and other Court of Appeals decisions. However, these decisions for the most part antedate 1940 and all are easily distinguishable on their facts from the situation presented in the instant case.* The *City of Chicago* and *Columbia Broadcasting System* cases are much more recent authority, are more closely in point and quite clearly lay down a rule contrary to that which defendants adduce . . .

Moreover, even if defendants were correct in claiming that plaintiffs interest must be of a character recognized at common law, plaintiffs would have standing. The sub-

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* Typical of the cases on which defendants rely is a 5th Circuit decision which is of particular interest to courts in this jurisdiction and therefore is deserving of special comment. This case, *Rural Electrification Administration* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (5th Cir. 1966), cert. den., Oct. 11, 1966, like almost all the other authorities relied on by defendants, involved a situation where an unrelated third party was objecting to a government contract or loan. The court stressed that "appellees are not parties to the loan" and that the action complained of was not directed to or against them. 354 F. 2d at 865. In the instant case, plaintiff is no stranger to the challenged regulation. The regulation operates directly and specifically on plaintiffs own rights and on no one else' rights and thus is quite readily distinguishable from *Louisiana Elec.* and similar cases.

stance of plaintiffs claim is that the assignment restrictions in 7 U.S.C. Sec. 1444(d)(13) and 16 U.S.C. Sec. 590h(g) are in the nature of "spendthrift" trust provisions. Following this analogy, the challenged regulations are comparable to a decision by the trustee of a spendthrift trust that he will no longer observe certain aspects of the spendthrift provision. This would quite clearly be a breach of trust and the courts would stand ready to prevent the trustee from carrying it out. Thus, the plaintiffs grievance is one which would have been recognized at common law.

A recognition of plaintiffs standing is not only supported by judicial precedents. It is supported by good sense as well. The courts have long recognized a need to be flexible in fashioning remedies to deal with agency action in excess of statutory authority.

The instant case squarely represents a situation where a remedy must be fashioned to avoid defeating the Congressional purpose. The assignment restrictions set forth in 7 U.S.C. Sec. 1444(d)(13) were intended to protect the interests of poorly educated sharecroppers and tenants who might fritter their subsidies away on ill-advised assignments.* This proceeding offers the only possible opportunity for this sharecropper-tenant group to preserve its rights under 7 U.S.C. Sec. 1444(d)(13). No other procedures are available for review of the Secretary's decision and no further action by the Secretary can be awaited for challenge. There is no other party who is in a better position to challenge these regulations. This

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* "The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902.

* * * *

"Whether or not the Congress intended judicial enforcement of a particular statutory command is not conclusively answered by the absence of any specific statutory remedy. *The courts have always been able to fashion remedies to prohibit agency action in violation of a statutory requirement, if a failure of enforcement would occasion a defeat of the apparent Congressional purpose." Deering Millieken, Inc.* v. *Johnston*, 295 F. 2d 856, 861-63 (4th Cir. 1965) (Emphasis added.)

See *Leedom* v. *Kyne*, 358 U.S. 184, 190-91 (1958).

sort of situation where no other remedy is available presents the strongest possible case for granting review. See *Leedom* v. *Kyne, supra; Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (D.C. Cir. 1965).

B. *This is not an Unconsented Suit Against the United States*

In claiming that the doctrine of sovereign immunity bars this action, defendants rely on the "general rule" stated in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This general rule is, of course, that a suit seeking official action by government officers is barred without the consent of the government.

Defendants concede this general rule and agree that *Larson* is the leading case on the subject. Plaintiffs direct this court's attention, however, to that fact that the *Larson* case expressly recognizes a longstanding exception to this general rule.

It has been universally recognized since *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912) that a suit challenging action by an official in excess of his statutory authority is not a suit against the sovereign. The formulation of this exception in *Larson* was as follows:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . (W)here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. at 689-90.

As has repeatedly been pointed out, the gravamen of plaintiffs' challenge is that the Secretary of Agriculture has acted in excess of his authority. This case therefore falls squarely within this exception the general rule.

Moreover, this suit is authorized by Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. Sec. 1009, which entitles persons suffering legal wrong or adversely affected by agency action to judicial review of that action in any court of competent jurisdiction. This action is clearly within the scope of Section 10 of the APA. Unless section 10 is to be rendered meaningless, it must be interpreted as a waiver of sovereign immunity to the extent that immunity would preclude this action. See *Adams* v. *Witner*, 271 F. 2d 29, 34-35 (9th Cir. 1958).

C. *There Is No Lack of Jurisdiction over Indispensable Parties*

Prior to 1962 the doctrine of indispensable parties created no end of difficulty for litigants and the courts. It gave rise to a mass of conflicting decisions that could not be reconciled and it virtually forced litigants to concentrate all suits against government officials in the District of Columbia where high ranking officials were subject to personal service.

In order to alter this rule, which was felt to be "contrary to the sound and equitable administration of justice," Congress in 1962 enacted a special statutory provision permitting suit against government officials to be brought anywhere in the United States. See S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), in U.S. Code Cong. & Ad. News 2784, 2786 (1962). This special provision altered venue rules to permit such suit and provided for service of process on the defendant government officials by certified mail outside the territorial limits of the state where suit was brought. See 28 U.S.C. Sec. 1391(a).

Everyone had thought that the troublesome doctrine of indispensable parties had been laid to rest. See Davis, Administrative Law Sec. 27.08 (Pocket part 1965). However, the government is now trying to resurrect the doctrine by reading 28 U.S.C. Sec. 1391(e) narrowly so as not to include an action where government officials are joined with non-government persons as defendants.

There is nothing in the legislative history or purpose of 28 U.S.C. Sec. 1391(e) which suggests that it was not

meant to cover such action. On the contrary, the provision was meant to provide judicial remedies for the average citizen close at home where it will be less expensive and where judges will be more familiar with the plaintiffs problems. See S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), in U.S. Code Cong. & Ad. News 2784 (1962). Of course, Sec. 1391(e) applies only to government officials; normal service and venue requirements must be met with regard to a non-government defendant. But with regard to government officials, the burdens of defending litigation out of state are no greater than where they are sued alone.

Defendants attempt to justify their narrow reading of Sec. 1391(e) by pointing to the part that the special remedial statute covers situations where "each defendant" is a government official. There are two meanings which may be given to this "each defendant" phrase. It could be read as defendants suggest, or it could more logically be read to mean only that the special Sec. 1391(e) rules cannot be extended to non-government persons, i.e., only "each defendant" who is a government official is covered by the statute. Under this more logical interpretation, an action which joins government officials and non-government persons would have to satisfy service and venue requirements of Sec. 1391(a) with regard to each government defendant *and* normal service and venue requirements with regard to non-government persons. In this case all such requirements are satisfied.

It seems sensible to interpret a statute such as Sec. 1391(e), which is designed to eliminate an absurd and technical procedural doctrine, in the manner which will best accomplish that purpose. Since there is no logical reason why a joinder of government and non-government officials should defeat the application of Sec. 1391(e) the broader reading of the "each defendant" test should be adopted.

However, even if the narrow reading of Sec. 1391(e) suggested by defendants is adopted there is no need for this action to be dismissed. It is respectfully requested that the court sever the First Claim, which is the only

claim against government officials, and proceed with this claim separately. Such severance is clearly authorized by Rule 21 of the Federal Rules of Civil Procedure. This severance would enable the application of Sec. 1391(e) even under defendants narrow reading.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Motion to Dismiss of Defendants Freeman, Godfrey and Collins be denied in its entirety.

Respectfully submitted,

/s/ Charles S. Conley
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Of counsel:

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435 West 116th Street
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(The foregoing instrument carries proper Certificate of Service which is not copied here.)

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IN THE UNITED STATES DISTRICT COURT

CLEMON BARLOW, ET AL., PLAINTIFFS

v.

J. A. MINTER, JR., doing business as J. A. Minter and Son; B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture, DEFENDANTS

ORDER—February 21, 1967

This cause is now submitted upon the motion of the defendant J. A. Minter, Jr., doing business as J. A. Minter and Son, said motion having been filed herein on December 21, 1966, and the motion of the defendants B. L. Collins, Horace Godfrey and Orville L. Freeman, sued in the capacities set forth in the caption of this order, said motion having been filed herein on February 1, 1967. In each of the motions the defendants seek dismissal of the complaint.

Plaintiffs in this action seek a declaratory judgment that certain amended regulations adopted by the Department of Agriculture[1] are invalid and unauthorized by statute. The regulations in question govern assignments by farmers of subsidy payments under the Upland Cotton Program and other federal agricultural programs. Plaintiffs further seek to enjoin the defendant federal officials from permitting assignments pursuant to the amended regulations or making subsidy payments pursuant to assignments already made. Plaintiffs are tenant farmers, who allege they sue on behalf of themselves and others similarly situated. The defendants are the Secretary of Agriculture, two officials of the Department of Agricul-

[1] 7 C.F.R. 709 et seq. "Assignment of Payment", as amended at 31 F.R. 2815, February 17, 1966.

ture and the plaintiffs' landlord. More specifically, the plaintiffs in their first claim, which is against the defendant federal officials, assert that Orville L. Freeman as Secretary of Agriculture is authorized to promulgate regulations pursuant to the Food and Agriculture Act of 1965; that subsidy payments to cotton farmers are provided for by the Act, that partial payments may be made in advance, and that payments made pursuant to the Act may be assigned. Plaintiffs further assert, in their first claim, that assignments of payments may be made "as security for cash or advances to finance making a crop . . . ." Plaintiffs contend that the regulations allow assignment of payments as security to finance "payment of cash rent for land used" in the making of a crop and that plaintiffs were required to enter into such arrangements by their landlord. Plaintiffs ask this Court to declare that the assignments for cash rent do not finance making a crop; that the amended regulations are unauthorized by law, and that the defendant federal officials should be enjoined from putting said regulations into force and effect.

Plaintiffs' second claim against the landlord, J. A. Minter, Jr., alleges that the said defendant acted to improperly deprive plaintiffs of their right to receive subsidy payments under the Act. Plaintiffs in their third claim, which is also against Minter only, contend that some of the plaintiffs have been illegally ordered to vacate defendant's premises because of their participation in litigation with respect to the cotton program, and in the case of plaintiff W. Blocton, because of his candidacy for "A.S.C.S. County Committeeman."

It is apparent to this Court that, as to claims two and three, which are against Minter only, this Court has jurisdiction, and that as to these two claims, which cannot be determined without affording the plaintiffs and the defendant Minter an opportunity to present their testimony, the defendant Minter's motion to dismiss must be denied and the case, as to claims two and three, must proceed to a hearing.

As to the motion of the defendant federal officials, this Court concludes that their motion to dismiss is well taken.

These defendants have not taken any action which directly invades any legally protected interest of the plaintiffs. For plaintiffs to have jurisdictional standing to challenge administrative action, it must be demonstrated that a "legally protected interest" is invaded by such administrative action. *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943); *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123. Here, it affirmatively appears from plaintiffs' first claim that they have no legally protected interest and, further, that there has been no direct invasion of any such interest. The regulations pertaining to assignments permit a landlord and tenant to agree to an assignment of benefits under the program as security for the payment of cash rent by the tenant to the landlord. Whether such assignment is requested by the landlord or agreed to by the tenant does not affect plaintiffs' right to participate in the subsidy program and does not affect plaintiffs' right to benefits under the program.[2] Such assignments, if made, are strictly between the plaintiffs and their landlord. Plaintiffs have no legal right to prohibit their landlord from requesting such, and plaintiffs may not require these federal official defendants to prohibit such contractual arrangements. The regulations challenged are permissive and not mandatory. They do not represent the exercise of regulatory power over private business or employment. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. See also *Massachusetts* v. *Mellon*, 262 U. S. 447. For these reasons, plaintiffs lack standing to maintain this action against these governmental officials.

In addition, it affirmatively appears from the complaint, the statute involved, and the assignment of payment regulations (7 C.F.R. 709 et seq.) that the regulations are consistent with statutory authority and are neither arbitrary nor capricious. In such instances, regulations are presumed to be valid. *United States* v. *Obermier*, 186 F. 2d 243 (2d Cir. 1960); *United States* v. *Watkins*, 173 F. 2d 599 (2d Cir. 1949), aff'd 338 U. S. 537.

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[2] The Upland Cotton Program, 7 U.S.C., Section 1341, et seq.

Under the circumstances herein presented, the scope of judicial review of such regulations is limited. The United States Court of Appeals for the Fifth Circuit in *Southwestern Electric Power Co.* v. *Federal Power Commission*, 304 F. 2d 29 (5th Cir. 1962), declared such principle as follows:

> We must assume that even if we disagree with this decision of the Commission that these expenditures should be assigned to Account 538, that disagreement would not of itself warrant our setting aside the Commission's determination. "It is a fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 112, 67 S. Ct. 133, 91 L. Ed. 103.

On this first point, plaintiffs first claim is patentably insufficient. The Food and Agriculture Act of 1965 specifically authorizes assignments by farmers to "finance making a crop." The challenged regulation as amended defines the words "to finance making a crop" as including "the payment of cash rent for land used therefor." The conclusion is inescapable that such regulations are reasonable and consistent with the statute; this Court finds that they are as a matter of law. Likewise, this Court finds that the regulations as amended are not arbitrary or capricious. The wisdom of such a regulation is a matter which has been committed to the expertise of the Secretary of Agriculture. A court cannot substitute its judgment for that of the officials who administer the program:

> The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 538,

> is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224 (1943).

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that the motion to dismiss filed hereby the defendant J. A. Minter, Jr., on December 21, 1966, be and the same is hereby denied. It is further ORDERED that this cause, as between the plaintiffs and the defendant Minter on claims two and three, proceed to pretrial as scheduled for Thursday, February 23, 1967, at 9:30 a.m.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion to dismiss filed herein on February 1, 1967, by the defendants Collins, Godfrey and Freeman, each in his official capacity as above indicated, be and the same is hereby granted.

Done, this the 21st day of February, 1967.

/s/ Frank M. Johnson, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT

CLEMON BARLOW, ET AL., PLAINTIFFS

vs.

J. A. MINTER, JR., doing business as
J. A. MINTER AND SON

ORDER—February 23, 1967

This Court, by order made and entered herein on February 21, 1967, granted the motion of the defendants B. L. Collins, Horace Godfrey and Orville L. Freeman, all officials of the United States Department of Agriculture, to dismiss this action as to each of them. A formal order was entered on said date dismissing the case as to all defendants except the defendant J. A. Minter, Jr. Thus, the case, under its present posture, is between the plaintiffs, all of Dallas County, Alabama, and a defendant also of Dallas County, Alabama. Venue, therefore, is proper only in the Northern Division of the Southern District of Alabama, the division and district wherein Dallas County lies. Section 1391, Title 28, United States Code. This Court is of the opinion that, instead of the dismissal of this cause, the cause should be transferred to the division and district wherein venue is proper.

In the event this Court was in error in dismissing the cause as to the federal officials, the pleadings and briefs filed by the parties with this Court make it clear that it would have been appropriate for the case to have been transferred, for the convenience of the parties and witnesses and in the interest of justice, to the Northern Division of the Southern District of Alabama; in such an event said transfer would have been pursuant to Section 1404(a), Title 28, United States Code.

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that this cause be and the same is hereby transferred, pursuant to the provisions of Section 1391, Title 28, United States Code, to the Northern Division of the Southern District of Alabama for all further proceedings.

The Clerk of this Court is ORDERED and DIRECTED to forward the entire file in this cause, together with a copy of this order, to the Clerk of the United States District Court for the Southern District of Alabama at Mobile, Alabama.

Done, this the 23rd day of February, 1967.

/s/ Frank M. Johnson, Jr.
Chief Judge

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

* * * *

MOTION FOR CLARIFICATION OF ORDER—
Filed April 14, 1967

Plaintiffs respectfully move that the Court, nunc pro tunc, expressly determine (1) that its Order of February 21, 1967, in the titled action, which dismissed the action as to defendants Freeman, Godfrey, and Collins, was intended to provide for entry of final judgment, and (2) that there is no just reason for delay in entering such judgment; all as provided in Rule 54(b), Federal Rules of Civil Procedure.

A proposed order is attached hereto, as is a supporting memorandum of law.

Respectfully submitted,

/s/ CHARLES S. CONLEY
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Montgomery, Alabama
Attorney for Plaintiffs

[Certificate of Service (Omitted in Printing)]

MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION OF ORDER—Filed April 14, 1967

In its Order of February 21, 1967, the Court provided that "It is the further ORDER, JUDGMENT AND DECREE of this Court that the motion to dismiss filed herein on February 1, 1967, by the defendants Collins, Godfrey and Freeman, each in his official capacity as above indicated, be and the same is hereby granted." It was plaintiffs' understanding that this Order was intended to act as a final judgment as to these three defendants. The Court's subsequent Order of February 23, 1967, which treated these defendants as no longer being parties to the action, confirmed plaintiffs' understanding in this regard.

In these circumstances—*i.e.*, where a separable claim was dismissed against separate defendants—the Order of the Court clearly would have been an appealable final judgment under the traditional rules governing appealability in the federal courts and under the original version of the Federal Rules of Civil Procedure. *United States* v. *River Rouge Co.*, 269 U. S. 411 (1926); *Republic of China* v. *American Express Co.*, 190 F.2d 334, 335-36 (2d Cir. 1951); 6 Moore, Federal Practice at 162-65 (discussing original version of Rule 54(b)). However, as amended in 1946 and again in 1961, Rule 54(b) of the Federal Rules has made it doubtful whether this Order is an appealable final judgment unless and until the trial judge expressly determines that there is no just reason for delay in entering final judgment and expressly directs such entry of judgment. If such express determination and direction are not made, the order may be deemed to be non-final until all other aspects of the action against other defendants are completed. See *Cook* v. *Eizeman*, 312 F.2d 134, 136-37 (5th Cir. 1963); *Ronel Corp.* v. *Anchor Lock of Florida, Inc.*, 312 F.2d 207, 208 (5th Cir. 1963); *Reed* v. *National Old Line Ins. Co.*, 239 F.2d 594, 596 (5th Cir. 1956); *Republic of China* v. *American Express Co., supra*, at 338-39. The appropriate procedure for a party wishing to obtain entry of final judgment is to move the court for an express de-

termination and direction as provided in Rule 54(b). *Reed* v. *National Old Line Ins. Co., supra,* at 596.

There is no doubt that it is appropriate for the Court to determine that there is no reason for delay in entering final judgment regarding the Order of February 21, 1967. The amendments to Rule 54(b) were not intended as a rejection of the prior rule but only as a means of giving the courts discretion to temper the harshness of the rule in borderline cases. See Advisory Committee Note to 1946 Amendment in 6 Moore, Federal Practice at 10-12. The Order of February 21, 1967 operated as a final and complete determination of plaintiffs' First Claim and totally ended the action with regard to defendants Collins, Godfrey and Freeman. The future course of plaintiffs' other claims against defendant Minter cannot in any way affect the status or proper outcome of the claim against defendants Collins, Godfrey and Freeman. This is the clearest possible case for determining and directing entry of judgment without delay. See 6 Moore, Federal Practice at 226. *Cf. Shippers Pre-Cooling Service* v. *Macks,* 181 F.2d 510, 514 (5th Cir. 1950), *cert. denied,* 340 U. S. 816 (1950).

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IN UNITED STATES DISTRICT COURT

BARLOW, ET AL., PLAINTIFFS

v.

MINTER, ET AL.

ORDER, DETERMINATION AND DIRECTION—
Filed April 14, 1967

Plaintiffs' Motion for Clarification of Order having properly come before the Court, it is hereby ordered, determined and directed, nunc pro tunc, that insofar as the Order of February 21, 1967 in the title cause dismissed the action as to defendants Collins, Godfrey, and Freeman,

(1) there is no just reason for delay in entry of final judgment, and
(2) the entry of final judgment in accordance with said Order of February 21, 1967, is directed as provided for in Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: , 1967.

FRANK M. JOHNSON, JR.
Chief Judge

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 22, 1967

NOTICE is hereby given that CLEMON BARLOW, SINNIE BLOCTON, WALTER BLOCTON, ARTHUR BROWN, WILLIE GILCHREST, ELIJAH GREEN, OTIS HALE, WILL MOORER and WILL WILLIAMS, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from that part of the Order granting the Motion to Dismiss of Defendants COLLINS, GODFREY, and FREEMAN, entered in this action on February 21st, 1967.

/s/ CHARLES S. CONLEY
Attorney for Appellants
315 South Bainbridge
Montgomery, Alabama

DATED: Apr. 22, 1967

[Certificate of Service (Omitted in Printing)]

MEMO: $250.00 CASH DEPOSITED IN REGISTRY OF COURT BY PLAINTIFFS IN LIEU OF APPEAL BOND, AS CASH BOND ON APPEAL.

WILLIAM J. O'CONNOR
Clerk

[STIPULATION AS TO RECORD ON APPEAL—Filed May 19, 1967 (Omitted in Printing)]

[Certificate of Printer Preparing Record (Omitted in Printing)]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24886

CLEMON BARLOW, ET AL.

versus

COLLINS, GODFREY & FREEMAN

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 24, 1968

On this day this cause was called, and after argument by Donald A. Jelinek, Esq., for appellants, and Norman Knopf, Atty., Department of Justice, for appellees, was submitted to the Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24886

CLEMON BARLOW, ET AL., APPELLANTS

versus

B. L. COLLINS, State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture, APPELLEES

Appeal from the United States District Court for the Middle District of Alabama

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge

OPINION—July 16, 1968

DYER, Circuit Judge: Appellants, tenant farmers receiving benefits under the Food and Agriculture Act of 1965, 7 U.S.C.A. § 1444, appeal from the District Court's decree granting the motion of defendant-appellees Collins, Godfrey and Freeman to dismiss appellant's complaint. The District Court held that appellants did not have standing to challenge an amendment to regulations issued by the Secretary of Agriculture defining permissible assignments by tenant farmers of land diversion payments made to them under the Act. We agree and affirm.

The assignment of diversion payments is governed by the provisions of 16 U.S.C.A. § 590h(g). 7 U.S.C.A. § 144(d)(13). At the time the regulation in question was amended section 590h(g) provided, in pertinent part, that a farmer could assign his payments "as security for cash or advances to finance making a crop." From 1938 to 1966 the Secretary of Agriculture's policy and regulations excluded from the term "making a crop" cash or commodity rent for a farm. 20 Fed. Reg. 6511 (1955). In February, 1966, the regulation was amended to allow a tenant to assign his payments to secure rent for his farm. 31 Fed. Reg. 2815 (Feb. 17, 1966). Appellants' complaint asserts that they "are suffering irreparable injury" because, under the amended regulation, they "were each year required [by their landlord] to execute a rent note as security for the cash rent of this land" and thus were deprived of the bargaining power the payment had given with various merchants and suppliers in previous years. They argue that the regulation in its present form violates the intent of Congress and constitutes illegal action by the Secretary.

In the case of *REA* v. *Central La. Elec. Co.*, 5 Cir. 1966, 354 F.2d 859, cert. denied, 385 U.S. 815, this Court set forth specific criteria for determining whether appellants have standing to challenge an administrative regulation.[1] These criteria are based upon and designed to implement the basic premise of section 10 (a) of the

[1] The Court stated the criteria in the form of four questions:

1. Does this case raise anything more than "mere economic competition made possible by governmental action"?

2. If not, has Congress, expressly or by implication, given [plaintiff-] appellees standing to sue under the terms of the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C.A. § 901, et seq.?

3. Has Congress, expressly or by implication, conferred jurisdiction on the Courts to review the granting or denial of a proposed REA loan?

In view of the effort to invoke Amendment 5 of the Constitution, we add a fourth question:

Have appellees shown any legally protected property right to be free of competition from the prospective borrower?

REA v. *Central La. Elec. Co.*, *supra* at 863.

Administration Procedure Act, 5 U.S.C.A. § 702.[2] Thus, in the absence of an express or implied statutory grant of standing, mere economic harm to an appellant "made possible by government action (even if allegedly illegal) does not give standing to sue to restrain such action." *REA* v. *Central La. Elec. Co., supra* at 863, and authorities cited therein.

When the Fifth Amendment is invoked, as it is here, it must be determined whether appellants have established "any legally protected property right," *id., i.e.,* any legal right to be restrained from assigning their diversion payments to their landlord. See *Braude* v. *Wirtz*, 9 Cir. 1965, 350 F.2d 702, 707; *Pennsylvania R.R.* v. *Dillon*, D.C. Cir. 1964, 335 F.2d 292, 294, *cert. denied sub nom., American-Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945. Appellants contend that they have such a right because the statute in question was enacted for their benefit. However, a policy of protecting a class of persons does not, without more, grant a legal right to those persons to enforce the policy. *REA* v. *Northern States Power Co.*, 8 Cir. 1967, 373 F.2d 686, 695. Furthermore, "allegations of a legally protected right is a *constitutional predicate of standing* to attack governmental action." *Pennsylvania R.R.* v. *Dillon, supra* at 294. (Emphasis added.) We have found no such allegation in appellants' complaint.

Here, as in *REA* v. *Central La. Elec. Co.*, a long standing administrative policy has been reversed. However, there is nothing in this record to show a statute or contract between the government and appellants granting them a property right in being restrained from assigning their payments to their landlord. Appellants attempt to show that the statutory phrase "making a crop" precludes assignment for land rent because it is a technical phrase meaning "to prepare a crop for use or storage at the

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[2] That section reads:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is emtitled to judicial review thereof.

last stage of development." Appellants' Brief, p. 24 (citing Oxford English Dictionary M-64 (1908)). We are unwilling to accept such technical niceties, especially in light of a recent amendment to the statute which added, after the phrase "to finance making a crop" the words "handling or marketing an agricultural commodity, or performing a conservation practice." 16 U.S.C.A. § 590h (g) (Supp. 1967).[3] The substance of the amendment clearly evinces a Congressional willingness to expand areas of permissible assignment. Furthermore, over the years the Secretary has amended the assignment regulation to allow assignment as security for such items as food and clothing for the tenant and his famliy when in the Secretary's expert judgment practical considerations have warranted such changes. Appellants challenge only the farm rental portion of the regulation and have failed to show any statutory or contractual right to challenge that provision of the regulation allowing them to assign for rent on the land upon which their crops are grown while taking advantage of the same regulation to assign for food, clothing, etc. to be used while that crop is growing.

Appellants' final argument, that by the adoption of 16 U.S.C.A. § 590h (g) as part of the Food and Agriculture Act of 1965, Congress approved and adopted the administrative construction of that statute so that the regulation cannot now be changed by administrative action, is totally without merit. The regulation was amended in February, 1966. In November, 1966, some ten months later, Congress reconsidered and amended section 590h(g). Thus, if any administrative construction of the statute could be said to have been approved by Congress, it would be the interpretation then in effect, *i.e.*, that diversion payments *may* be assigned as security for farm rent.

The remaining criteria set forth in *REA* v. *Central La. Elec. Co.*, *supra* may be summarized as follows: Have appellants shown that the case presents more than mere

[3] The legislative history sheds no light on the reasons for this amendent. See 3 U.S. Code Cong. & Admin. News 3819-3821 (1966).

economic harm made possible by government action; and, if not, that Congress expressly or impliedly in the Act gave them standing to challenge the Secretary's action, or that it gave the Courts jurisdiction to review that action. Without reiterating the facts developed above, appellants have shown only that their landlord has, under the amended regulation, demanded that they assign their diversion payments over to him as security for the rent of the farmland, and that this has deprived them of economic bargaining power. This is nothing more than an economic consequence permitted, but not required, by government action. Appellants have not shown us, nor have we found, any provision of the Food and Agriculture Act of 1965 [4] which either expressly or impliedly gives appellants standing to challenge this administrative regulation or gives the Courts authority to review such administrative action. To the contrary, the Act is replete with references to the Secretary's power to implement its provisions and evinces Congressional confidence in and reliance on the Secretary's expertise. As we concluded in *REA* v. *Central La. Elec. Co.*, *supra* at 865, this case is one where however outrageous or unfair appellants consider the effects of this regulation, their remedy lies not in the Courts but in Congress.

AFFIRMED.

TUTTLE, Circuit Judge, DISSENTING:

With deference I dissent from the opinion of the court. The federal statute which provides for the payment of these cash benefits to tenants and sharecroppers provides expressly that "in carrying out the provisions of this section, the Secretary shall, as far as practicable, protect the interests of tenants and sharecroppers." 16 U.S.C.A. § 590(h)(b). The provision which authorizes the assignment by a tenant is limited by the terms of the statute

[4] The provisions of this Act are to be found in 7 U.S.C.A. §§ 608c, 1301, 1314b, 1332-1335, 1339, 1339a, 1339c, 1340, 1346, 1348, 1350, 1353, 1374, 1379b-i, 1427, 1444, 1445a, 1782; 16 U.S.C.A. § 590p.

to assignments "as security for cash or advances to finance making a crop." The authority of the Secretary to issue regulations cannot authorize the issuing of a regulation that permits an assignment for something other than "as security for cash or advances to finance making a crop." It is perfectly plain to me that the Secretary, for thirty years, correctly construed the language of that section to prohibit an assignment by a tenant for rent for the land upon which he would then undertake to "make a crop." It seems equally clear to me that the new regulation which authorizes an assignment as security for the payment of rent of the land goes beyond the statutory authorization because it is not an assignment as security for either "cash or an advance," nor, in my opinion, is it an assignment "to finance making a crop." The making of a crop is something that takes place on the land once acquired. I would construe this language as a matter of law as to exclude the cost of obtaining the land upon which the crop is to be made.

I would have no difficulty in concluding that the authorization under this statute to a tenant or sharecropper to make an assignment for the purpose of obtaining seed and fertilizer necessary to make a crop is a special benefit conferred on him by Congress, particularly in light of the express concern demonstrated by Congress by including the language quoted above in subparagraph (b) of the Act. Nor would I have any difficulty in understanding the special benefit which Congress meant to confer upon a tenant by combining an *authorization* to make a limited assignment for the "making of a crop," with a clearly implied *denial* of the right to make the assignment for the payment of rent for the purpose of acquiring the land upon which he was to operate. This meets the test of standing to sue. I would base this conclusion on what this court has said in Rural Electrification Administration v. Central Louisiana Electric Co., 5 Cir., 354 F. 2d 859, where, at page 863, the court discussed the question of standing. It suggested that standing to sue would be found if Congress "expressly or by implication [has] given [the parties] standing to sue under the terms of the" particular statute involved. I

think the right given to the tenants in this statute to have the privilege of making assignments for the cash and other advances used in making a crop, but restricting their right to assign for any other purpose, is a right that is peculiar to such tenants as a class and for their special benefit. I, therefore, think that the Congress has impliedly granted them standing to sue. Moreover, I think the reasoning of the Supreme Court, in its opinion in Abbotts Laboratories v. Gardner, makes it clear that where there is no other way to obtain judicial review of administrative action that infringes a right granted by Congress, there is nothing in the Administrative Procedure Act that would prohibit judicial review of such administrative action.

I conclude, therefore, both that there was standing to sue, and that, on the merits, the Secretary's regulation broadening the language of the statute, as I view it, to include the making of an assignment for rents to landlords was invalid as going beyond the statute.

I, therefore, respectfully dissent from the opinion of the Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24886

D. C. Docket No. CA 4482-67

CLEMON BARLOW, ET AL., APPELLANTS

versus

B. L. COLLINS, State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture, APPELLEES

Appeal from the United States District Court for the Middle District of Alabama

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge

JUDGMENT—July 16, 1968

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Clemon Barlow, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

TUTTLE, Circuit Judge, dissents.

Issued as Mandate: August 7, 1968

[Clerk's Certificate (Omitted in Printing)]

SUPREME COURT OF THE UNITED STATES

No. 1271 Misc., October Term, 1968

CLEMON BARLOW, ET AL., PETITIONERS

v.

B. L. COLLINS, ETC., ET AL.

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 16, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the Appellate docket as No. 1535 and placed on the summary calendar.

And it is further ordered that the culy certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357059 49

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 249

REPLY BRIEF NOT PRINTED

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

LEMON BARLOW, *et al.*,

Petitioners,

vs.

B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Services; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 249

CLEMON BARLOW, *et al.*,

Petitioners,

vs.

B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Services; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' BRIEF

Opinions Below

The opinion of the United States Circuit Court of Appeals (A. 63-69) is reported at 398 F.2d 398 (1968).

The opinion of the United States District Court for the Middle District of Alabama (A. 51-55) is unreported.

Jurisdiction

The judgment of the Fifth Circuit Court of Appeals was entered on July 16, 1968 (A. 70-71). An order granting an extension of time within which to file this Petition for Certiorari was signed by Mr. Justice Black on October 13, 1968, extending said time to and including December 13, 1968. The petition was filed in this Court on December 13, 1968, and certiorari and leave to proceed *in forma pauperis* were granted on June 16, 1969. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§1331, 1337, 1343, 1346, 1361, 2201 and 2202; 42 U.S.C. §1981 *et seq.* and the Civil Rights Act of 1964. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes and Regulations Involved

The pertinent portions of Section 402 of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U.S.C. §1444; Section 8g of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35, 205, as amended, 16 U.S.C. §590h(g); United States Department of Agriculture Bulletin, "Instructions Relating to Assignment"; 20 Fed. Reg. 6511 (1955), as amended 31 Fed. Reg. 2815 (Feb. 17, 1966), are set forth in Exhibit A at pp. 43-45.

Questions Presented

1. Do petitioner-tenant farmers receiving land diversion and price support payments under the Food and Agriculture Act of 1965, 7 U.S.C. §1444, have standing to challenge a regulation promulgated under the Act denying them the protections of a long-standing statutory restriction on the assignability of benefits to landowners intended for their benefit.

2. May the Secretary of Agriculture abrogate such statutory restrictions protecting tenant farmers by repealing a 27-year old explicit prohibition in the regulation against assignments to landowners and promulgating a regulation endorsing such assignments, particularly where Congress incorporated the statutory restriction and the regulations under it before the repeal and endorsement.

Statement of the Case

This case involves a challenge to amended regulations issued by the Secretary of Agriculture which broaden the power of tenant farmers to assign land diversion payments made to them under the authority of §402(a) of the Food and Agriculture Act of 1965, 7 U.S.C. §1444(d)(13), 79 Stat. 1194. The Food and Agriculture Act of 1965 is omnibus legislation which, *inter alia,* establishes price support levels and soil diversion payments for various crop programs. Section 1444(d) prescribes price support and diversion payments for the Upland Cotton Program for the crop years through 1970.* A farmer may be eligible for price

* The statute authorizes such payments through the 1969 crop year, but it has recently been extended through 1970. Pub. Law 90-559, 80 Stat. 996 (Oct. 11, 1968).

support payments if he is "a producer on whose farm the acreage planted to the commodity does not exceed the farm acreage allotment for the commodity. . . ." 7 U.S.C. §1428 (b). In the Upland Cotton Program a farmer may qualify for acreage diversion payments by diverting "a portion of [his] cotton acreage allotment from the production of cotton to approved conservation practices to the extent prescribed by the Secretary. . . ." 7 U.S.C. §1444(d)(4). The Act makes special provision for the economic rights of small farmers who are tenants or sharecroppers by directing the Secretary to create "adequate safeguards to protect the interests of tenants and sharecroppers" and to "provide for the sharing of price support and diversion payments among producers on the farm on the basis of their respective shares in the cotton crop produced on the farm, or the proceeds therefrom, . . ." 7 U.S.C. §1444(d)(10).

Another special provision for small farmers is a limited right of assignment of payments. These assignments, like acreage allotments, are administered on the local level (usually the county) by the Agricultural Stabilization and Conservation Service (ASCS), an agency within the United States Department of Agriculture. 7 U.S.C. §§1421(a), 1444(d); 16 U.S.C. §590h(b). The county ASCS committee is authorized to process and enforce the assignment of payments only where the assignment is made for certain prescribed purposes. 7 U.S.C. §1444(d)(13); 7 C.F.R. 709. If the payment is assigned but the assignment is for improper purposes or not in conformity with the prescribed procedure, the payment is made directly to the producer. If the assignment is proper, however, it is recorded with the county committee and the federal agency; payment to the extent of the assignment is made directly to the as-

signee. Farmers may make only one assignment during the crop year.

At issue here is the extent of the limitation which Congress placed on the purposes for which the assignment may be made. Petitioners are tenant farmers growing cotton in Alabama who are required by their landlord, as a condition of continued tenancy, to assign to him their payments for the purpose of securing payment of cash rent. The assignment of payments for this purpose had been forbidden in the applicable regulation for a number of years and was authorized for the first time by an amendment of the assignment regulation issued February 17, 1966. 31 Fed. Reg. 2815 (1966) as amended, 7 C.F.R. §709.3. The particular issue here is whether Congress gave the Secretary authority to so expand the assignability of payments and whether ASCS may approve and process an assignment made for the purpose of securing cash rent for a farm.

The answer to this question lies in the interpretation of 7 U.S.C. §1444(d)(13), and 16 U.S.C. §590h(g), which in combination place strict and specific limits on the assignability of payments. Section 1444(d)(13) of 7 U.S.C., a provision under the Upland Cotton Program enacted by the Food and Agriculture Act of 1965, provides that:

> The provisions of section 590h(g) of Title 16 (relating to the assignment of payments) shall also apply to payments under this [program].

Turning to the "provisions" of 16 U.S.C. §590h(g), as amended, 52 Stat. 35, 205, we find:

> A payment which may be made to a farmer under this section may be assigned, without discount, by him in writing *as security for cash or advances to finance making a crop* . . . [emphasis added]

The statutory phrase delineating the boundary of permissible and effective assignability—"security for cash or advances to finance making a crop"—was unmistakably spelled out in the Secretary's regulations when in 1965 Congress incorporated the right of assignment in the Upland Cotton Program. Since the enactment of Section 590h(g) in 1938, the Secretary's published construction of the phrase had limited assignability:

> . . . (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. *Nothing contained herein shall be construed to authorize an assignment given to secure* the payment of the whole or any part of the purchase price of a farm or *the payment of the whole or any part of a cash or fixed commodity rent for a farm.*
>
> 20 Fed. Reg. 6511 (1955) [emphasis added]

Congress granted the right of assignment to cotton farmers in the same terms as those by which it had been limited for twenty-eight years: assignability did not extend to security for purchase or rental payments for a farm, and ASCS could not approve such payments.

In early 1966, however, the Secretary decided that the statute warranted his narrowing the limitation on assignments. He reversed his previous position regarding cash rent by deleting the prohibition of assignment for cash rent and expanding his interpretation of "making a crop" to include:

> . . . the payment of cash rent for land used (for planting, cultivating or harvesting).
>
> 31 Fed. 2815 (1966)

This case challenges the legality under the Food and Agriculture Act of 1965 of the Secretary's new, 1966 interpretation of "making a crop."

The practical effect of the Secretary's *volte-face* is to deprive tenant farmers of the use of the purchasing power that is available to them by virtue of their right to assign future benefits under the Upland Cotton Program. In the past, Petitioners were required by landowners to execute rent notes as security for the cash rent of the land they worked (A. 7). The note operated as a lien on the crop and farm equipment owned by Petitioners until the rent was paid. Because tenants had no money to pay rent until the crop was in, there was nothing the landowner could do but continue, as had been done for generations past, to get his rent at the end of the crop year. But as a result of the tenant farmer's own lack of funds and credit, he was held in virtual bondage by the necessity of getting groceries and supplies needed to make his crop from the landowner. These were supplied at high prices and high interest rates which exhausted Petitioners' profits at the end of the year.

The right to assign payments under the Upland Cotton Program, however, affords Petitioners a new source of

credit to finance their day to day expenses of "making a crop." * As a result, tenant farmers attain some measure of independence from their landlords by purchasing with cash or their expanded credit resources their supplies and necessities at lower competitive prices. Federal regulations issued pursuant to 7 U.S.C. §1444(d)(10), *supra*, would prohibit any direct landowner attempt to subvert this new opportunity. If, on the other hand, Petitioners may effectively make an assignment for rent their landlords will force them to do so by replacing them with other tenants if they refuse. This is not prohibited if the assignment is permissible. Once having assigned for rent, however, tenants are left, as before, subject to the landowner's power to manipulate prices and credit terms to his advantage. Tenant farmers are kept living at subsistence, without the modest measure of economic independence afforded by their power of assignability.

This suit was brought in the District Court for the Middle District of Alabama. The complaint asserted three separate claims, only the first of which sought relief against Respondents herein** (A. 3). The District Judge dismissed this claim on two grounds: that Petitioners did not have standing to challenge the 1966 regulation (A. 52-53) and, alternatively, that the Secretary's 1966 interpretation of

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* Thus in the Upland Cotton Program in 1968 there was widespread use of this assignment power by farmers with yearly incomes of between $1,000 and $2,000. Respondents' Brief in Opposition, p. 8, n. 5.

** The other claims charge that Petitioners' landlord unlawfully interfered with their right to receive subsidy payments under the federal program and unlawfully caused their eviction because of participation in litigation concerning the program. These claims were transferred for trial to the Northern Division of the District Court for the Southern District of Alabama.

the statutory language was permissible (A. 53-54). On appeal to the Fifth Circuit, that Court affirmed, Judge Tuttle dissenting, on the grounds that Petitioners lacked standing to challenge the regulation. 398 F.2d 398 (5th Cir. 1968) (A. 63-69). This Court granted a writ of certiorari on June 16, 1969 (A. 71).

Summary of Argument

I

The courts below erred in their determination that Petitioners lack standing to challenge the reversal by the Secretary of Agriculture of his long-standing administrative construction that payment for cash rent for land is not comprehended by the statutory phrase "making a crop," and therefore that assignments could not be made for that purpose.

In determining that Petitioners lack standing, the Fifth Circuit applied a test of standing which is manifestly inadequate in light of recent decisions both of this Court and other Courts of Appeals. Standing need not be predicated upon the existence of the traditional "legally protected interest," but rather may be established by actual economic injury together with the claim of Congressional intent to protect the plaintiff's class from such injury. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968).

It is clear that Petitioners are the intended beneficiaries of 7 U.S.C. §1444(d)(13) and 16 U.S.C. §590h(g). These two statutes, as exceptions to the generally applicable

statute, 31 U.S.C. §203, were intended to benefit tenant farmers in the Upland Cotton Program by providing them with additional means of securing credit to finance their farming operations.

II

The recently-changed regulation of the Secretary of Agriculture which permits assignment of cash rent for land is invalid and unauthorized by law in that it exceeds the statutory authority given to the Secretary.

A regulation which is in excess of statutory authority is invalid. As demonstrated in Part I, Congress intended that the phrase "making a crop" limit the Secretary's authorization of assignments in the Upland Cotton Program. As the payment of cash rent for agricultural land is not within the Congressional intendment of "making a crop," the Secretary's amendment of the regulation cannot stand.

The term "making a crop" is not broad statutory language, nor is it a phrase of common English usage which is susceptible to many variations in application. Rather it is a term of narrow signification limited by judicial and administrative construction of long standing.

The history of §590h(g) and the regulations thereunder demonstrate that Congress intended to prohibit assignments for cash rent of land. The administrative construction of the "making a crop" language for twenty-seven years reflected this prohibition. In addition, the technical agricultural definition demonstrates that the phrase "making a crop" deals with the farmer in the field growing his crop, not negotiating for his farm.

Nothing whatever suggests that by re-incorporating the "making a crop" assignment limitation in the Upland Cotton Program in 1965, Congress intended this language to serve different purposes than §590h(g), or that "making a crop" was to have a different meaning. Congress recognized, approved and adopted the Secretary's twenty-seven year construction of "making a crop" by enacting in another context the legislation in question. This Congressional ratification test of intent is perfectly consistent with Congressional policy, which is that of benevolence towards small farmers.

Nor does the November 1966 amendment to §590h(g) indicate otherwise. That amendment was a mere technical amendment, dealing only with simplification of the manner of making an assignment. There is no indication in the legislative history that Congress was aware of the Secretary's recent change in the regulation, or that the Secretary submitted for Congressional consideration that change, despite evidence of controversy over its validity. Thus Congress did not ratify the regulatory change.

Congress did not give the Secretary any broad power to create what he thinks is a fair balance between the competing interests of tenants and landowners as regards assignments. The assignment right and its limitations were intended solely for the benefit of small farmers. The Secretary may not redefine it to expose them to the very risks Congress guarded against.

ARGUMENT

I.

Petitioners Have Standing to Maintain This Action.

The Anti-Assignment Act, 31 U.S.C. §203, renders null and void any assignment of claims against the United States Government. Section 402 of the Food and Agriculture Act of 1965, 7 U.S.C. §1444(d)(13) (Supp. III), the meaning of which is at issue here, creates a limited exception to this rule in behalf of cotton farmers by making applicable to the Upland Cotton Program, 7 U.S.C. §1444 (d) (Supp. III), the "provisions" of §8g of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35, 205, as amended, 16 U.S.C. §590h(g) (Supp. III). That section now provides in relevant part:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing *as security for cash or advances to finance making a crop,* handling or marketing an agricultural commodity, or performing a conservation practice . . . .

As set out in the Statement of the Case, the substantive issue here is whether the Secretary, in 1966, erred by reversing his long-standing construction that payment of cash rent for land was not comprehended by the phrase "making a crop," and therefore that assignments could not be made for that purpose. The District Court and the Fifth Circuit held that Petitioners did not have standing to raise the issue. That determination was erroneous.

A. The Court Below Applied an Incorrect Test of Standing.

In determining that the Petitioners in this action lacked standing, the Court of Appeals for the Fifth Circuit applied a test of standing which is manifestly inadequate in the light of recent decisions both of this Court and other Courts of Appeals.

There has been a persistent tendency in the law of standing, especially as applied to benefit programs creating or protecting interests, to require that standing be predicated either upon specific statutory language conferring standing or upon the existence of a more or less traditional "legally protected interest." The majority opinion below clearly follows such reasoning:

> "Thus, in the absence of an express or implied statutory grant of standing, mere economic harm to an appellant 'made possible by government action (even if allegedly illegal) does not give standing to sue to restrain such action.'"
>
> citing and quoting from *REA* v. *Central La. Elec. Co.*, 354 F.2d 859, 863 (5th Cir. 1966), *cert. denied* 385 U.S. 964 (A. 65).

The Court below further states:

> "However, a policy of protecting a class of persons does not, without more, grant a legal right to those persons to enforce the policy" (A. 65).

This restrictive test of standing has also been sporadically applied in challenges to urban renewal relocation. See *Green St. Assoc.* v. *Daley*, 373 F.2d 1 (7th Cir.), *cert. de-*

nied, 387 U.S. 932 (1967), and *Johnson* v. *Redevelopment Agency,* 317 F.2d 872 (9th Cir.), *cert. denied,* 375 U.S. 915 (1963).

However, the holding of this Court in *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968) has put to rest any such restrictive notion of standing. Indeed, Respondents have admitted as much in their Brief in Opposition to the Petition for Certiorari:

> "We agree with petitioners that the test of standing here is that applied by this Court in *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 and by the Second Circuit in *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920."
>
> Respondents' Brief in Opposition, pp. 10-11.

Since the test of standing cannot be altered by agreement of the parties, and since restrictive notions of standing are still asserted and accepted in the lower courts, Petitioners shall briefly state the argument and authority for a broad test of standing in this case despite the apparent concession of the point by Respondents.

In *Hardin, supra,* this Court held that a private utility company had standing to assert competitive injury where the intent of Congress was to protect the private utilities from such competition. The *Hardin* holding is virtually in direct conflict with *REA* v. *Central La. Elec. Co.,* 354 F.2d 859 (5th Cir. 1966), *cert. denied,* 385 U.S. 815, upon which much of the reasoning of the Fifth Circuit in the instant case rests. In effect, *Hardin* may be taken to establish that economic injury in fact together with the claim of Congressional intent to protect the plaintiff's class from such injury is sufficient to establish standing.

Recent cases in the Court of Appeals for the District of Columbia Circuit have adopted just such a broad standing doctrine. Thus, in *Broadcast Enterprise Inc.* v. *FCC,* 390 F.2d 483 (D.C. Cir. 1968), that Court upheld the standing of one licensee to contest the assignment of a license to a more dangerous competitor. Further, in *Curran* v. *Clifford,* No. 21040 (D.C. Cir. Dec. 22, 1968), the Court upheld the standing of the National Maritime Union and its members to challenge alleged violations of 10 U.S.C. §2631 requiring that "only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies" bought for the United States armed forces. While the *Curran* court was divided on the issue of whether the matter was reviewable or had been committed to agency discretion, it was unanimous on the issue of standing.

The Second Circuit has been equally forceful in *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968), holding that displaced families have standing to challenge an alleged failure to make adequate relocation provisions and an alleged discriminatory renewal scheme. See also *Western Addition Community Organization* v. *Weaver,* 294 F. Supp. 433 (D.C. Cal. 1968).

All of these cases rest upon a rule of law which upholds the standing of a plaintiff who is in fact harmed by administrative action if there is evidence of a Congressional intent to protect the class to which the plaintiff belongs. This test is urged by the leading scholars in Administrative Law. See K. Davis, Administrative Law Treatise §22.02 at 213; L. Jaffe, Judicial Control of Administrative Action 336 (1965).

This issue does not involve "standing" in the sense of the constitutional requirement that there be an actual "con-

troversy." See, *e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968). Nor does it involve whether the Petitioners are the best possible among several alternative classes to bring the action. See, *e.g., Office of Communication of the United Church of Christ* v. *F.C.C.,* 359 F.2d 994 (D.C. Cir. 1966). There is no question of injury in fact from the challenged administrative action. In these circumstances standing to sue is really a question of reviewability *vel non.* See, Jaffe, *supra,* at 336. There exists a strong presumption that administrative action affecting the interests of individuals or groups is reviewable. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

The narrow test requiring that the interest invaded must be of "a recognized character at 'common law' or a substantive private legally protected interest created by statute," *Associated Industries* v. *Ickes,* 134 F.2d 694, 700 (2d Cir. 1943), *cert. granted,* 319 U.S. 739, *vacated as moot,* 320 U.S. 707, is not only initially question begging; it ignores that a growing number of federal statutes are intended to create and protect new interests, particularly of economically vulnerable or disadvantaged citizens. In these circumstances it is important for trial courts to know the circumstances in which the intended beneficiaries of these programs may challenge administrative action as beyond the scope of statutory authorization. A realistic examination of the intent of Congress to protect such persons provides a meaningful resolution of this question. It also preserves an effective opportunity to be heard. The test applied by the Court of Appeals below was clearly incorrect.

B. Plaintiffs Are Intended Beneficiaries of 7 U.S.C. §1444(d)(13) and 16 U.S.C. §590h(g).

Although the Court below denied standing on the basis of a very narrow test for determining whether standing exists, Respondents have defended the decision below while embracing a broader rule of law. In effect, the Respondents have asserted that Congress did not intend to protect persons in the class of the Petitioners herein through 7 U.S.C. §1444(d)(13). Respondents' Brief in Opposition, p. 12. This section of Petitioners' brief demonstrates that the protection of tenants and sharecroppers was the primary purpose of this section and that whatever the decision on the merits, such a broad intent to protect suffices to confer standing.

1. Plainly Section 7 U.S.C. §1444(d)(13), and before it, 16 U.S.C. §590h(g), were intended to benefit Petitioners by creating an exception in their behalf to the generally applicable statute, 31 U.S.C. §203, prohibiting all assignments of claims against the Government. As stated by the then Secretary of Agriculture Charles Brannan, in conjunction with legislation which would have repealed 16 U.S.C. §590h(g), that assignment provision "was enacted for the purpose of creating additional credit to farmers to assist them in financing farming operations . . . and was used principally by tenants and sharecroppers. . . ." Letter to the President of the Senate, January 21, 1952, S. Rep. No. 1305 (1952). The same goal of creating credit resources for small producers underlay Congress's action in making the "provisions" of 16 U.S.C. §590h(g) applicable in the Upland Cotton Program by 7 U.S.C. §1444(d)(13). With cash from assignments, small tenant and sharecropping farmers

can tide themselves over lean years, finance their crop, and, equally as important, avoid the high prices and interest rates they would incur by purchasing on credit at stores maintained by their landlords, who are their only other source of credit.

As 7 U.S.C. §1444(d)(13) is designed directly to benefit Petitioners and no one else, they have, under *Hardin*, standing to challenge any administrative construction of the statute which is detrimental to their interests, regardless of whether that construction cuts back their Congressionally granted assignment power or, as here, expands it in a manner that renders them potential victims of those upon whom they are economically dependent. Either may equally undermine the limited power granted to them. All that is relevant for standing is that the challenged administrative action be in fact detrimental to their interests. To hold otherwise would be in derogation of the well-settled principle that administrative action is not to be deemed unreviewable in the absence of an express Congressional statement of an intention to make it so. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Harmon* v. *Brucker*, 355 U.S. 579 (1958). Clearly, no one other than Petitioners has standing to raise the substantive problem at issue herein.

2. Petitioners thus submit that it suffices to create standing that the general statutory provision in question was intended for their, and only for their, benefit. There is no need, for standing purposes, to parse the statutory language to ascertain whether the particular clause in question was intended for their benefit. However, even if this be thought required, it is clear beyond a peradventure that the

limitations imposed upon Petitioners' assignment powers were intended for their benefit, and not, as Respondents suggest (Respondents' Brief in Opposition, p. 12, n. 8) as a balance between the Government's anti-assignment policies and farmers' needs.

Since the early New Deal, the federal government has sought to protect farmers' income both by limiting the supply of commodities produced and by supporting the prices at which they are sold. A persistent problem has been to devise some means to assure that the federal monies paid out help those farmers who are in need, rather than subsidize the already well-to-do.* While this problem is national in scope, it has always been particularly acute where, as in cotton farming, the small producer typically does not own his own land. Because he rents it or works it as a sharecropper he is, absent legal protection, at the mercy of the landowner's power to manipulate the terms of rent and credit for production loans so as to take from him the federal benefits ostensibly provided. In some cases it may even pay the landowner to evict tenants and sharecroppers.

As enacted, the Agricultural Adjustment Act of 1932 provided virtually no protection for these small cotton pro-

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* Westfall, *Agricultural Allotments as Property*, 79 Harv. L. Rev. 1180, 1204 (1966): "Even where allotments are generally believed to work best—in increasing the incomes of deserving agricultural producers—reality falls far short of the ideal. Indeed, incomes are increased, and by substantial amounts—but the increases flow largely to landowners because allotments are tied to land. The prevailing view of economists is that allotments have only a minor effect in increasing the returns for the human efforts that are involved in the production of allotted crops. The benefits have been capitalized in land values, without a comparable improvement in the economic position of non-landowning farm operators and farm workers." (Footnotes omitted.)

ducers. Ninety percent of the government payments went to landowners, Schlessinger, *The Coming of the New Deal* 77 (1958). Eviction of tenants and sharecroppers was also widespread under the impetus of the federal subsidy program. D. Conrad, *The Forgotten Farmers* 64-82, 201-09 (1965). Concern over this situation was expressed in Congress as early as 1934. 78 Cong. Rec. 4203 (1934) (Remarks of Rep. McGugin).* The Bankhead Cotton Control Act §15(b), 48 Stat. 598, 605 (1934), empowered the Secretary of Agriculture to "make regulations protecting the interest of sharecroppers and tenants." Far greater protection for tenants was provided by §§8(e) and (f) of the Soil Conservation and Domestic Allotment Act, as amended 16 U.S.C. §§590h(e), (f) (1964), which protections were enacted at the same time as was §8g, the assignment provision. All three provisions were part of §103 (entitled TENANT PROVISIONS) of the Agricultural Adjustment Act of 1938, 52 Stat. 35. Similarly, in the 1965 Food and Agriculture Act Congress included a provision in the Upland Cotton Program protecting the interests of tenants and sharecroppers in cotton diversion payments, 7 U.S.C. §1444(d)(10) (Supp. III). Pursuant to this section, the Secretary has issued regulations generally designed to protect tenants. 7 C.F.F. 722.817, 794.

A conference report, issued in relation to the now defunct Soil Bank Program, fairly states the Congressional attitude:

> No single problem connected with the proposed soil bank program had caused the committee more concern

* "[I]n the granting of the allotment checks, in great sections of the South, the tenants did not get their share of the checks. They were held out for debt, and now they are cast into unemployment and distress." 78 Cong. Rec. at 4203.

> than that of guaranteeing adequate protection of tenants and sharecroppers under the program.
>
> Conference Report on H.R. 12, 84th Cong. 2d Sess., n. 7.

In this program too Congress required for tenants "such provision as may be necessary to prevent them from being forced off the farm." Act of May 28, 1956, 70 Stat. 197.

It is against this backdrop of pervasive federal concern for the plight of tenant and sharecropping farmers that the purposes of limited assignments must be assessed. We start with §8g of the Soil Conservation and Domestic Allotment Act, the statute which 7 U.S.C. §1444(d)(13) incorporates by reference. Section 8g, as amended 16 U.S.C. §590h(g) was offered on the floor of the House in 1937 by Representative Fulmer of South Carolina as a committee amendment to the then pending amendments to the Soil Conservation and Domestic Allotment Act. 82 Cong. Rec. 844. The assignment right was necessary to generate credit for poor tenant and sharecropping farmers. As passed by the House, it permitted assignments, but *only* to landlords. Representative Fulmer recognized that "this may give the landlord an opportunity to gyp his tenants or sharecroppers," but he thought speculators were likely to be even less solicitous of tenants' welfare. When a similar amendment was twice offered in the Senate, it was twice rejected because it provided insufficient protections for the poor farmer. 82 Cong. Rec. 1755-1756, 1766 (1937). As finally enacted, §8g was a compromise effected in conference. It enabled farmers to make assignments but it imposed three limitations: the assignment must be "to finance making a crop" (a term of art as we shall see in Part II herein); it

could not pay or secure pre-existing indebtedness; and it must be made without discount. The Respondents, while admitting that "all three limitations were stressed by the Managers on the part of the House in their report," H.R. Rep. No. 1767, 75th Cong., 3d Sess. 60 (1938) suggest that "no explanation is given." Respondents' Brief in Opposition, p. 11, n. 7.

What explanation is needed when the import of Congresssional action is plain on its face? That §8(g) creates a beneficial exception to a general federal policy of no assignments is obvious. The only doubts as to the wisdom of creating this exception went to whether it would do more harm than good in the long run because of speculators and greedy landowners. These fears were met by a compromise solution imposing three restrictions, each of which is designed to protect the tenant both from his own improvidence and from his economic vulnerability. Plainly, the limits on assignments as well as the basic right to assign are designed and intended to protect Petitioners, just as are the restrictions in a spendthrift trust. This was recognized by successive Secretaries of Agriculture who, until 1966, construed the statutory language "making a crop" to protect small farmers against landowners' demands for assignments to pay rent. U.S. Dept. of Agriculture, "Instructions Relating to Assignments"; 20 Fed. Reg. 6511, 6512 (1955).

This then was the situation when §402 of the Food and Agriculture Act of 1965 was enacted. The part of that section at issue here, 7 U.S.C. §1444(d)(13) does not attack the assignment problem afresh but simply incorporates §8(g):

> "The provisions of Subsection 8(g) of the Soil Conservation and Domestic Allotment Act, as amended

(relating to assignment of payments), shall also apply to payments under this subsection."

Respondents apparently take the position that while §8(g) might be designed to protect Peitioners, there is no "conclusive" evidence that 7 U.S.C. §1444(d)(13) was enacted to serve the same purpose. Respondents' Brief in Opposition, pp. 11-12. Plainly to require such conclusive evidence would be a perversion of the principles of statutory construction. The very fact that Congress incorporates one provision of the law into another demonstrates confidence that the purposes of new law will be well served by application of the old. Is §8(g) to be construed in one manner, and 7 U.S.C. §1444(d)(13) in another? If Respondents' position were accepted no one would have standing to sue unless Congress dealt with all manner of situations and spelled out the objects of its bounty in far more detail than is its wont.

II.

The Challenged Regulation Is Invalid and Unauthorized by Law in That It Exceeds the Statutory Authority Given to Defendants.

A. A Regulation Which Is in Excess of Statutory Authority Is Invalid.

On the merits, the question herein is whether Congress intended by enacting 7 U.S.C §1444(d)(13) in 1965 to authorize the Secretary to promulgate regulations providing for the assignment of diversion payments to secure payment of cash rent for land to be used in producing a crop. Ascertainment of Congressional intent focuses on the

question of what Congress meant by the phrase "to finance making a crop." As we have seen, Congress used this phrase to limit the Secretary's authorization in the Upland Cotton Program by making §8(g) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C. §590h(g), applicable to that program. Therefore unless the payment of cash rent for agricultural land is within the Congressional intendment of "making a crop," the Secretary's amendment of the regulation cannot stand.

It may be useful briefly to state again why the issue is important to Petitioners. It boils down to who gets the cash or purchasing power generated by assignments during the making of a crop. If a tenant farmer has the power to assign his federal entitlements for rent, then the landowner from whom he rents can effectively force him to do so. If he refuses, he will, as have several Petitioners herein, be thrown off the land and replaced by another more pliant poor farmer (A. 8). But by assigning away his federal benefits, he loses his only realistic source of credit other than the landowner himself. From then on, he has to buy his food and tools at the landowner's store, typically at prices and interest rates leaving him no profit at the end of the crop season. If on the other hand he simply cannot get cash to pay rent, and no one else in the community can either, there is no practical alternative for the landowner but to maintain the traditional practice of collecting rent, which cannot be quickly increased under federal regulations, 7 C.F.R. §722.817, at the end of the season.

In defining the term "to finance making a crop," the Secretary must act within the limits of his statutory authorization. He cannot issue regulations applying the terms of the statute that exceed the limits of that author-

ity. *Miller* v. *United States,* 249 U.S. 435, 440 (1935); *Campbell* v. *Galeno Chemical Co.,* 281 U.S. 599, 610 (1930). The extent of his authority is necessarily a matter for the determination of the court, not of the administrator himself. *Addison* v. *Holly Hill Fruit Co.,* 322 U.S. 607, 616 (1944). This is particularly so here.

Where Congress delegates administrative authority to promulgate regulations affecting individuals or groups, the exercise of administrative judgment is generally preceded by a rulemaking hearing, at which the persons affected may be heard and the agency informed of the impact of its proposed action. Such a proceeding assures that the agency has deliberated on the matter and has been informed of the relevant considerations in the discharge of its policy-making functions. *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 (1943). It also assures the persons affected an opportunity to be heard. These factors are among the reasons for judicial deference to administrative judgment. *Cf., Columbia Broadcasting System* v. *F.C.C.,* 311 U.S. 132 (1940). Where, as here, there is no rulemaking proceeding, only the issuance of an amendment without discussion or explanation, it is appropriate for a court to look more closely at what the agency has done.

The Secretary's interpretation of statutory language at any time is not conclusive, though of course it has weight in judicial consideration. The weight depends, as the Court has said, on the generality or specificity of the statutory authorization:

> The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called,

> its details. But when Congress wants to give wide discretion it uses broad language. *Addison* v. *Holly Hill Fruit Co., supra,* at 616.

The term "making a crop" is surely not "broad language" conveying a "wide discretion" as are such guides as "the public interest, convenience and necessity" and what is "just and reasonable." See *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U.S. 266 (1933); *Tagg Brothers & Moorehead* v. *United States,* 280 U.S. 420 (1930); 1 K. Davis, *Administrative Law* §2.03 (1958). Nor is the statutory term in question a phrase of common English usage which would be susceptible to many variations in application. Compare *Cargo Carriers* v. *Snyder,* 104 F. Supp. 258 (D.D.C. 1952). Rather, as we shall show *infra,* the term "making a crop" is one of narrow signification limited by judicial and administrative constructions of long standing. It is not a term Congress would have chosen to authorize the Secretary to make and revise policy within wide discretion on the assignability of price supports and diversion payments. Thus, his action cannot be supported on the grounds that he "was entrusted . . . with the responsibility of selecting the means of achieving the statutory policy." Compare *American Power & Light Co.* v. *SEC,* 329 U.S. 90, 112 (1946).

Nor is this a case where the Secretary can claim comfort in the thought that administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently when they are yet untried and new." *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315

(1933); *Udall* v. *Tallman*, 380 U.S. 1, 11 (1965); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940). It is true that the 1965 Act was a new law, but it is the administrative interpretation of aged §8(g) that has been changed, and is complained of herein—not any administrative ruling issued under the 1965 Act. Any deference accorded by maxim should go to those who first construed §8(g) in 1938, almost immediately upon its enactment. Secondly, the presupposition of Congressional incorporation of one statute into another is precisely that the law is *not* "untried and new." To allow an administrator special latitude in redefining the basic terms of the incorporated statute would be to undercut Congress's action. Congress knew an approach works or worked once before with satisfactory results, and it directed that the same thing be done again.

If, as we shall show, the Secretary's definition of "making a crop" is contrary to Congressional understanding of the term, this Court must strike it down.

B. The Legislative, Administrative and Common Law Meaning of the Term "Making a Crop" Precludes Defining It to Include Payment of Rent for Land.

Assignment rights under 7 U.S.C. §1444(d)(13) are established by incorporation of the "provisions" of §8(g). Therefore, in the absence of any indication to the contrary in the legislative history of the 1965 act, it is to §8(g) and its legislative and administrative history that the Court must look in ascertaining the permissible meanings of "making a crop." Respondents' suggestion (Respondents' Brief in Opposition, p. 15) that the Congressional purposes underlying 7 U.S.C. §1444(d)(13) can be ascertained with-

out reference to the history of §8(g) and the regulations issued thereunder is as erroneous in this context as in the "standing" context. Whether or not the Soil Conservation and Domestic Allotment Act was "moribund" as regards assignments is irrelevant. What is important is that Congress in looking for a legislative mechanism to authorize limited assignments of farm subsidies, in the context of a program once again authorizing special protection for tenants and sharecroppers, 7 U.S.C. §1444(d)(10), decided to adopt the same compromise solution that had earned Congressional approval twenty-seven years earlier.

Turning again to the history of §8(g), Petitioners have shown in Part I of this brief that the law was passed in Congress only as a result of a compromise that imposed, for the benefit of small farmers, substantial limits on their power to assign, including the limit that the assignment be made to finance "making a crop." The phrase, though it is simple English, may not be dismissed as a colloquial equivalent of "to grow a crop." The term originally meant to prepare a crop for use or storage at the last stage of development.* See *Texas & Pacific Ry. Co.* v. *Bayliss,* 62 Tex. 570, 574 (Sup. Tex. 1884); *Driver* v. *Maxwell,* 56 Ga. 11, 20 (Sup. Ct. Ga. 1876) (dissenting opinion). A more recent and broader usage is that given in the Dictionary of Agricultural and Allied Terminology, at 643 (J. Winburne ed. 1962): "to plow and fit land, to plant seed, to cultivate, to harvest, etc." In all usages, however, the term deals with the farmer in the field growing his crop, not negotiating for his farm. Undoubtedly Congress was familiar with this technical usage or else it would not have chosen

* For example, "to make hay" meant to turn cut hay for drying by the sun in the field. Oxford English Dictionary M-64 (1908).

the term, as it so plainly did, as a device to restrict assignments.

Upon enactment of §8(g), it was incumbent upon the Secretary to issue a definition of making a crop. He did so in the following "Instructions Relating to Assignments and Use of ACP-69":

> A. To finance making a crop.—A payment which may be made to a farmer (hereinafter referred to as the "assignor") under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop. To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (2) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor for the purpose of making a crop; or (3) to finance the carrying-out of soil-building of range-building practices. *Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.* (emphasis added)

Substantially this definition, including the express prohibition against assignment for payment of cash or fixed commodity rent, was carried forward and formally published in 1955, 20 Fed. Reg. 6511.

Whether the Secretary's 1938 definition of making a crop be thought a broad reading consistent with the tech-

nical usage of the term, or instead a definition which departed from that usage better to effectuate the Congressional purposes which led to §8g's enactment is of no consequence.* The important consideration is that the Secretary recognized that assignment of payments for cash rent was not within the Congressional understanding of the limits imposed by the term "to make crop." The problem dealt with then, as now, was to provide some credit to economically weak farmers without its dissipation by the controlling economic figure in the setting, the landlord.

Undoubtedly, even without the power to assign, tenants are still potential victims of landowners' power over them. There are many ways to utilize economic dominance. The theory of the federal agriculture programs, however, has not been directly to reform one-sided economic relationships in the rural South but rather to prohibit landowners' manipulation of those traditional relationships so as to deprive small producers of their fair share of federal benefits. This approach is explicit in §§8(e) and (f) of the

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* The question is whether the technical agricultural usage of the term "making a crop" would include purchase of the necessaries of life and the performance of conservation practices. Assignment for these purposes was permitted by the Secretary from the outset. Purchase of the farmers' food and clothing is an expense of labor, and thus properly part of making a crop. The expense of soil and conservation practices are also within the agricultural meaning of the phrase. They are recurrent expenses necessary to protect both crops, and the land. This was the lesson of the dust bowls, and it led to enactment of the Soil Conservation and Domestic Allotment Act.

Without regard to the technical meaning of the phrase, the then Secretary's 1938 action can be justified as well within the purposes which Congress intended to serve by using the phrase "making a crop." The 1966 regulation does not conform to the technical meaning of "making a crop"; nor can it be thought a permissible variation designed to accomplish Congressional intent.

Soil Conservation and Domestic Allotment Act, 16 U.S.C. §§590h(e), (f), enacted at the same time as §8(g), and implicit, as recognized by the Secretary's regulations issued under 7 U.S.C. §1444(d)(10), in the Upland Cotton Program. The well-settled restriction on assignability for rent was part and parcel of the same Congressional approach. It deprived the landowner of a mechanism for avoiding the burden he traditionally assumes to collect rent at the end rather than the beginning of the year by usurping the credit given to tenant farmers in the federal program.

With this background, we come to ascertaining the Congressional will as of the time the Food and Agriculture Act of 1965 was enacted. As we have said, nothing whatever suggests that 7 U.S.C. §1444(d)(13) was intended to serve different purposes than §8(g) or that "making a crop" was to have a different meaning. Common sense suggests that if this had been intended, Congress would have redrafted the provision. Surely the contemporaneous enactment of 7 U.S.C. §1444(d)(10) establishes that Congress was still well aware of the need of tenant farmers for special protection under the law. Furthermore, such legislative history as there is indicates that Congress was actually aware that "making a crop" did not include paying rent. The Conference Report on the 1965 act states:

> Cotton farmers may assign their direct price support and diversion payments to private lending agencies in obtaining production loans.
>
> Confer. Rep. No. 1123, 89th Cong. 1st Sess. [1965 U.S. Code Cong. & Admin. News 5966]

"Production loans" are not loans for rent, and loans for rent are not usually made by private lending agencies.

Coupled with some express evidence of Congressional intent is the undeniable and eloquent fact that the impermissibility of assignments for rent had been crystal clear for 27 years prior to the 1965 act. A federal regulation unequivocally and emphatically expressed the Secretary's settled interpretation of "to finance making a crop," and rent assignments were barred by it. It follows from a basic principle of statutory construction that Congress recognized, approved and adopted this construction by enacting in another context the language in question. *Wyoming* v. *United States*, 310 F.2d 566, 580 (10th Circ. 1962). Accord, *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920). See *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *Cammareno* v. *United States*, 358 U.S. 498 (1959); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

Undoubtedly this principle of statutory construction, like most others, is not to be woodenly applied to all situations. The interactions of Congressional and administrative processes are too complex to resolve automatically by reference to the generalities of maxims. But the principle has special force where, as here, Congress does not bother to repeat statutory language but rather expressly adopts and incorporates another definition by reference. In 7 U.S.C. §1444(d)(13) Congress tersely made "the provisions of Section 8(g) . . . apply to payments under this subsection." 7 U.S.C. Sec. 1444(d)(13). This cursory treatment evinces rare confidence in the clarity and settled character of statutory "provisions." The use of such an indefinite term as "provisions" to refer to as cryptic a statute as §8(g) implicitly recognizes that its provisions were spelled out in regulations. Had Congress meant to

authorize the Secretary to begin again, and to give the assignment right in the Upland Cotton Program a life of its own, independent of the history of Section 8(g), Congress would have enacted a newly drafted assignment provision.

Of course, Congress does not legislate by incorporating short-hand at the risk of freezing all current administrative interpretation into law. It is a question of legislative intent in each case. Here the Congressional ratification test of intent is perfectly consistent with Congressional policy, which is that of benevolence toward small farmers. There is no reason to suppose that Congress would acquiesce for twenty-seven years in an administrative ruling that improperly restricted the freedom of the tenant farmer to secure the financing of his crop with his subsidy payment. On the contrary, in the same Food and Agriculture Act in which it gave such casual attention to the right of assignment, Congress by specific provision granted in the Upland Cotton Program the right to sell or lease one's allotment. 7 U.S.C. §1305. In contrast to this unambiguous expression of intent, §1444(d)(13) reflects the well established understanding that assignments to finance tenant farmers' "making a crop" does not include assignments to secure the payment of rent. Congress did not alter the meaning of the phrase. Accordingly, when the Secretary re-defined "to finance making a crop" in February, 1966, 31 Fed. Reg. 2815, to allow cash payments for rent, he acted in contravention of the Congressionally-determined meaning of the phrase. His regulation is therefore invalid.

Petitioners' position is in no way undermined by the 1966 Amendment to Section 8(g), 80 Stat. §1167, as

amended 16 U.S.C. §590h(g), as will be seen from a review of the circumstances surrounding this amendment. The amendment, enacted after the issuance of the regulations complained of herein, was principally designed to render more convenient the witnessing of assignments. It also marginally broadens the purposes for which assignments may be made. Respondents argue that Congressional acquiescence in the changed definition of "making a crop" can be inferred from this amendment and accompanying silence as to the new regulations. Respondents' Brief in Opposition, p. 15, n. 10.

No such inference is warranted, even under the broadest notions of tacit acquiescence—the sounds of silence. The 1966 amendment to Section 8(g) originated as H.R. 13863. As introduced by Congressman Gathings, 112 Cong. Rec. 6570 (1966), it dealt only with simplification of the manner of making an assignment. Prior to 1966 an assignment had to be witnessed by a member of the County Committee, and "the farmer, in many cases, was required to make several trips to his local committee office before he could find a member of the committee present to witness his signature of the assignment." H.R. Rep. No. 2223, 89th Cong. 2nd Sess. (1966). H.R. 13863 would have done nothing more than provide for simplifying the assignment process by authorizing more people to serve as witnesses. The bill was referred to the Department of Agriculture for its suggestions. The Department agreed that the change was desirable, but it also requested other changes, including expansion of "the purposes for which an assignment is authorized to include handling or marketing an agricultural commodity or performing a conservation practice." Letter of John Schnittker to Harold Cooley, August

23, 1966, H.R. Rep. No. 2223, 89th Cong. 2d Sess. (1966). Assignments for conservation practices had always been expressly allowed in the long-standing Department regulation, and assignments for marketing, although not mentioned in the regulation, had been given effect by some local committees as within the meaning of "making a crop." Neither of these clarifications touch upon any area in which there is potential for abuse for tenant farmers. They were not controversial.

A clean bill, H.R. 17588, incorporating the Department's proposals, was then reported out by the House Committee on Agriculture. It passed without substantial discussion in both the House and Senate. In both chambers of Congress, the sponsor of the bill expressly stated that its purposes were only to ease the technical aspects of the assignment process. 112 Cong. Rec. 27077, 27990 (1966).

Further, nothing in the legislative history of the 1966 amendment to Section 8(g) indicates that the Department of Agriculture alerted Congressional attention to the fact that it had, a few months before, changed the settled interpretation of "making a crop" to deprive tenant farmers of the substantial protections they had had. There is plainly no basis for assuming that Congressional leaders, or the Congress, knew of these changes on their own, since the challenged regulation had been issued shortly before, and its impact had not yet been fully recognized by tenant farmers. What is important to note is that the Department did *not* seek express legislative authorization for a major change in policy that had stood for nearly thirty years, even though it was given carte blanche to suggest an overall redrafting of Section 8g's provisions. In response to this invitation, the Department urged Congress to specify that

assignments could be made for conservation practices, although the Secretary had always construed such practices to be part of "making a crop." See "Instructions Relating to Assignments," *supra.* It also urged the explicit inclusion of assignments for handling or marketing an agricultural commodity. Both of these requested specifications were consonant with prevailing practices, and, most critically, the interest of tenant farmers. Why the Department thought it appropriate to seek express Congressional approval of assignments for these purposes, one of which it had authorized for thirty years, while not seeking approval of a major policy reversal made but a few months before, can only be left to surmise. But the Department's submissions and omissions do not lend support to Congress' awareness, no less approval, of this significant regulatory change.

In these circumstances, there can be no affirmation of the Secretary's new regulation on a theory that Congress has silently approved the change in regulations to include payment of cash rent as a part of "making a crop." The District of Columbia Circuit recently dealt with a strikingly similar situation in *Freeman* v. *Seligson,* 405 F. 2d 1326 (1968), in which the Secretary of Agriculture argued that Congressional approval of his long-standing but controversial interpretation of §8 of the Commodity Exchange Act, 7 U.S.C. §12, could be inferred from Congressional silence, particularly insofar as Congress had recently amended the law in question. Holding against the Secretary, the majority of the Court rejected this simplistic approach, and indeed turned the argument against him. The Court noted:

> We close by reference to the recent statute wherein Congress enacted numerous amendments to the Commodity Exchange Act, including Section 8. These amendments were proposed by the Department of Agriculture, and several were put forth with the explicit purpose of providing express statutory confirmation of long-standing interpretations of the Secretary. Yet [despite a recent lower court rejection of the Secretary's interpretation], no attempt was made to seek Congressional confirmation of the Secretary's approach. This kind of consideration is neither decisive nor a makeweight. It tends to reinforce the conclusion that we have reached. . . . 405 F. 2d at 1352.

In this case too the Secretary sought confirmation of a long-standing rule, while, for whatever reasons, avoiding submitting for Congressional consideration an obviously more controversial matter. Petitioners submit that the only inference that may be drawn from the 1966 amendment to 16 U.S.C. §590h(g) is that Congress was in accord with the "only purpose of the bill," to "make it a little more convenient to make the assignments that are currently made by the thousands during the year." 112 Cong. Rec. 27077 (1966)

C. The Secretary's Regulation Is Internally Inconsistent, and Reflects an Incorrect View of His Role in Construing the Act.

We have shown that the phrase "making a crop" is an agricultural term of art relating to working land to produce crops. We do not believe it can fairly be stretched to cover renting land. However the Secretary has not chosen *any* fixed agricultural meaning of the term. Thus, he pro-

vides in the challenged regulation, 7 C.F.R. 709.3(b) (1968) that:

> "to finance making a crop means . . . the payment of cash rent for land used therefor;"

while 7 C.F.R. §709.3(c) informs us:

> "Nothing contained herein shall be construed to authorize an assignment given to secure . . . the payment of the whole or any part of a fixed commodity rent for a farm."

If obtaining land is part of "making a crop" on the theory that it is a factor of production, then it should be irrelevant whether the rent for such land is expressed in terms of cash or a fixed commodity. The assignment to secure cash rent or fixed commodity rent is or is not to finance "making a crop." Certainly, the purchase of seeds or a rake remains a part of "making a crop" regardless of whether the purchase price is expressed in terms of cash or goods. Why is land different?* Why is the old rule changed in one respect and not the other?

Because the Department of Agriculture does not hold rulemaking hearings, or even issue explanations of its ruling on permissible assignments, Petitioners can only guess as to what considerations led the Secretary to his reversal of the Department's long settled position on assignment for cash rent. Probably of key importance is that landowners

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* If the distinction is justifiable, it is only on a theory which admits that the restrictions on assignments were, in the 1965 act, intended to benefit poor farmers.

have been hurt by the drop in the loan rate on cotton to 21 cents a pound.* Therefore to help them out, the Secretary gave them a mechanism by which they can secure large amounts of additional credit at the beginning of the year. Meanwhile, as a bonus for tenants the Secretary issued regulations, as he was charged to do by 7 U.S.C. §1444(d)(10), protecting them against other forms of abuses. As the Government characterizes this exercise:

> "[W]e believe the Secretary's regulations . . . *viewed as a whole,* adequately carry out his statutory duty to 'provide adequate safeguards to protect the interests of tenants and sharecroppers.'" Respondents' Brief in Opposition, 16. [Emphasis added.]

Something was done for the tenants; something was done for landowners. The Secretary giveth, and the Secretary taketh away.

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*Instead of direct subsidy payments, farmers have the option of receiving government loans ("price support loans") against their crop, to be repaid when the crop is actually sold—this enables them to store the crop at harvest time until the market is better and still receive a support payment at the time of harvesting. Prior to the 1965 legislation only price support loans were available to farmers, at a rate of approximately $.30 per pound. The Act of 1965 reduced this rate to a figure calculated on the basis of the world price for cotton, $.21 per pound, with an additional $.09 per pound available for cotton produced for domestic markets, which was to be at least 65 per cent of their total production. In addition, for the first time in 1965 additional payments were authorized for diversion of farm land from cotton production to conservation uses. The general purposes of the Food and Agricultural Act of 1965, however, remain the same as the general purposes of all major agricultural legislation since the 1930's: curtailment of production and concurrent income maintenance for farmers. In this respect, then, the 1965 Act is in no way "new and different," as Respondents allege. Respondents' Brief in Opposition, p. 15.

Petitioners submit that this is administrative lawlessness. Congress does not authorize the Secretary to administer the programs it creates on an *ad hoc* basis, picking and choosing here and there to create an overall policy that the Secretary deems economically fair. Compromises obviously have to be made between landowner and tenant interests, but these are to be made primarily by Congress, and only by the Secretary insofar as Congress delegated that power to him. Obviously 7 U.S.C. §1444(d)(13) is not such a delegation and it cannot be used as a balancing device between interests of the two groups. It was intended solely for the benefit of poor farmers in need of credit, not for landowners in search of quicker rent collections. The Secretary may not emasculate the specific statute in search of some broader policy he deems wise.

As was said by this Court in an analogous context, "the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." *American Shipbuilders Co.* v. *N.L.R.B.*, 380 U.S. 300, 310 (1965). *See also, N.L.R.B.* v. *Insurance Agents*, 361 U.S. 477 (1960).

Even if Congress did not intend in 1965 to "freeze" the definition of "making a crop," the term is plainly intended as a limitation for the protection of tenants. The Secretary may not redefine it to expose them to the very sorts of risks Congress guarded against.

III.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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EXHIBIT A

Statute and Regulations Involved

Section 402 of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U.S.C. §1444(d)(13) (Supp. III) provides:

> The provisions of section 590h(g) of Title 16 [8g of the Soil Conservation and Domestic Allotment Act, as amended] (relating to the assignment of payments) shall also apply to payments under this [program].
>
> • • • • •

Section 8g of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35, 205 (1938), as amended, 16 U.S.C. §590h(g) (Supp. III) (80 Stat. 1167, Nov. 2, 1966), provides:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop, *handling or marketing an agricultural commodity, or performing a conservation practice.*•
>
> • • • • •

U. S. Department of Agriculture, "Instructions relating to assignments and use of Form ACP-69" (1938) provided:

> A. To finance making a crop.—A payment which may be made to a farmer (hereinafter referred to as the "assignor") under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop. To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (2) to provide food, clothing, and other necessities required by the assignor or persons dependent

• The italicized language was added by the amendment of November 2, 1966.

upon the assignor for the purpose of making a crop; or (3) to finance the carrying-out of soil-building or range-building practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.

20 Fed. Reg. 6511, 6512 (Sept. 3, 1955), as amended by 31 Fed. Reg. 2815 (Feb. 17, 1966), provided at the time this action was brought:

Payment may be assigned to finance making a crop. A payment which may be made to a farmer • • • under section 8 of the Soil Conservation and Domestic Allotment Act as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor *and the payment of cash rent for land therefor;* (b) to provide food, clothing, and other necessities required by the assignor or persons dependent on the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a [cash or] fixed commodity rent for a farm.*

• • • • •

* The italicized language was added and the bracketed language deleted by the amendment of February 17, 1966.

32 Fed. Reg. 14921 (Oct. 28, 1967), 7 C.F.R. 709.3 (1968) now provides:

Purposes for which a payment may be assigned.

(a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any preexisting indebtedness of any nature whatsoever.

(b) To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor, or (2) to provide food, clothing, and other necessities required by the producer or persons dependent upon him.

(c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 249

CLEMON BARLOW, ET AL., PETITIONERS

v.

B. L. COLLINS, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (R. 63) is reported at 398 F. 2d 398. The opinion of the district court (R. 51) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1968. By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to and including December 13, 1968. The petition was filed on December 13, 1968, and was granted on June 16, 1969 (R. 71; 395 U.S. 958). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statute authorizing farmers to assign their federal farm payments "to finance making a crop," 16 U.S.C. 590h(g), was intended to protect farmers by rendering them unable to make certain assignments, and thus gives farmers standing to challenge an administrative interpretation of that phrase to include assignments to secure payment of the cash rent of their farm land.

2. If petitioners have standing, whether the Secretary of Agriculture's interpretation of the phrase "to finance making a crop" to include assignments to secure the payment of cash rent for the land upon which crops are grown is reasonable and consistent with the statute.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Anti-Assignment Act, 9 Stat. 41 (1846), 31 U.S.C. 203, the Food and Agriculture Act of 1965, 79 Stat. 1194, the Soil Conservation and Domestic Allotment Act, 52 Stat. 35 and 205, and pertinent regulations are set out in the Appendix.

STATEMENT

Petitioners are farmers who rent the land on which they farm and use it to participate in the upland cotton program under the Food and Agriculture Act of 1965. 79 Stat. 1187–1213 (codified in scattered sections of Titles 7 and 16 of the United States Code). They seek a declaratory judgment invalidating so much of a regulation of the Secretary of Agriculture as permits them to assign their expected federal farm pay-

ments to their lessor for the purpose of securing the payment of their cash rent obligation. They allege that as part of the agreement to lease farm land their lessor has required them to make such assignments to him, and will not rent to them unless they do. As a result, they claim, they are required to obtain financing of all their other farm needs from him as well,[1] and thus are deprived of a measure of economic independence from him which they say was a purpose of the 1965 Act to grant. They commenced this action on behalf of themselves, and others similarly situated, in an effort to avoid this alleged compulsion by eliminating the authority which permits them to assign their expected farm benefits under the upland cotton program to secure the payment of cash rent.

1. Congress enacted the upland cotton program as part of the Food and Agriculture Act of 1965, primarily to reduce over-production of cotton. See S. Rep. No. 687, 89th Cong., 1st Sess. (1965) p. 2; H. Rep. No. 1123, 89th Cong., 1st Sess., pp. 33–34 (1965). To that end, the 1965 Act substantially reduced the benefits which cotton farmers could receive for their cotton. While formerly they could obtain "loans" at the rate of approximately $.30 per pound of cotton, pledging their cotton crop as collateral, the 1965 Act reduced this figure to a rate calculated on the basis of the world price for cotton, $.21 in 1966; additional price support payments of approximately $.09 per pound were to be paid only for cotton produced for do-

[1] The Department of Agriculture limits the number of assignments which can be made in any crop year to one.

mestic markets, which was established to be at least 65 percent of total cotton production. 7 U.S.C. 1444 (Supp. IV). This reduction of benefit levels was intended to reduce the incentive to farmers to raise excess cotton. See H. Rep. No. 1123, *supra,* 34; S. Rep. No. 687, *supra,* at pp. 55–57. At the same time, the Act provided for payments to be made to farmers who diverted some of their land from cotton production to conservation uses, and made such diversion mandatory for larger farms seeking participation in the subsidy loan program. 7 U.S.C. 1444 (Supp IV).

Since cotton farmers were no longer assured of the previous high loan rate on their entire crop, financing the expenses necessary to produce a crop—including the cash rent cost of land in the case of farmers like petitioners who rent their land—became more difficult. In recognition of this difficulty, the 1965 Act provided that the Secretary of Agriculture could authorize payment of up to 50 per cent of the estimated payments to a farmer in advance of the growing season, 7 U.S.C. 1444(d)(5)(Supp. IV),[2] and also expressly made Section 8(g) of the Soil Conservation and Domestic Allotment Act, as amended, 16 U.S.C. 590h(g), applicable to the upland cotton program. 7 U.S.C. 1444(d)(13). Section 8(g) establishes an exception to the general prohibition of assignment of federal monies in the Anti-Assignment Act, 31 U.S.C. 203, for farmers who assign federal farm payments

[2] The Secretary has authorized advance payment only with respect to diversion payments. 7 C.F.R. 722.813. Since no diversion payments were made in 1969, 34 Fed. Reg. 1225, no advance payments were authorized for that year except for "small farms" with a total acreage allotment of fifteen acres or less. 34 Fed. Reg. 1225, as amended, 34 Fed. Reg. 5481.

in compliance with stated conditions, in order "to finance making a crop." In a separate provision, the 1965 Act required the Secretary—as had many earlier acts—to "provide adequate safeguards to protect the interests of tenants and sharecroppers, including provision for sharing diversion payments on a fair and equitable basis under this subsection." 7 U.S.C. 1444 (d)(10)(Supp. IV).

Within a few months after the 1965 Act was enacted, the Secretary adopted the regulations here challenged, which defined the expenses of "making a crop" to include, *inter alia,* the cash rent cost of farm land. 31 Fed. Reg. 2815 (Feb. 17, 1966), 4888 (March 24, 1966). At the same time, pursuant to his responsibility to "provide adequate safeguards to protect the interests of tenants and sharecroppers," he adopted regulations requiring that a landlord's or operator's benefits must be denied if

> (1) The landlord * * * has not afforded his tenants and sharecroppers an opportunity to participate in the program;
>
> (2) The landlord * * * has, in anticipation of or because of participating in the program, reduced the number of tenants and sharecroppers on the farm * * *
>
> (3) There exists between the * * * landlord and any tenant or sharecropper, any lease, contract, agreement or understanding unfairly exacted or required by the * * * landlord which was entered into in anticipation of participating in the program, the effect of which is:
>
> (i) To force the tenant or sharecropper to pay over to the landlord * * * any payment earned by him under the program;

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> (ii) To change the status of any tenant or sharecropper so as to deprive him of any payment or right which he would otherwise have had under the program; * * *
>
> (iv) To increase the rent to be paid by the tenant or decrease the share of the crop or its proceeds to be received by the sharecropper * * *.
>
> [31 Fed. Reg. 4887–4888; 7 C.F.R. 722.817, 794.3 (1968).]

2. Section 8(g) of the Soil Conservation and Domestic Allotment Act, as enacted in 1938 and as it read in 1965, provided:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances *to finance making a crop.* Such assignment shall be signed by the farmer and witnessed by a member of the county committee * * *. Such assignment shall include the statement that the assignment is not made to pay or secure any pre-existing indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary * * * if payment to the farmer is made without regard to the existence of any such assignment, * * * [52 Stat. 35 and 205 (1938), 16 U.S.C. 590h(g) (Supp. IV); emphasis added].

Shortly after its enactment, the Secretary of Agriculture established the procedures for applying the statute and defined its operative terms. (See Instructions Relating to Assignments and use of Form ACP–69, issued April 9, 1938, and set out in full as an exhibit to petitioners' brief in the court of appeals, pp. 53–66.) He defined the statutory phrase "to finance

making a crop" to include the expenses of planting, cultivating, or harvesting a crop, of providing food and clothing for the assignor and his dependents, and of conservation practices; he excluded the expense of purchasing farm land [3] or paying its cash or commodity rent.

In the first years of operation of the 1938 Act, payments were made both for undertaking conservation measures and to support the price of the commodities participating farmers grew. Commodity payments ceased, however, during World War II, when the demand for foodstuffs rendered them unnecessary, and Congress therefore stopped appropriating funds for this purpose. Since that time, only conservation payments have been made, and the provision permitting assignment of federal payments has been of slight importance. For example, in 1952—the last year in which statistics were recorded—the Department of Agriculture's Agricultural Stabilization and Conservation Service informs us that only 2,140 of 2,483,000 participating farmers made assignments, including five assignments in Alabama and ten in Mississippi. In the same year, the Secretary of Agriculture unsuccessfully sought the repeal of Section 8(g), arguing that it had ceased to be important once commodity payments were no longer made. S. Rep. No. 1305, 82d Cong., 2d Sess., p. 3.

Nonetheless, the Secretary reiterated his administrative interpretation of Section 8(g), including his construction of "to finance making a crop," in formal

[3] As is essentially required by the statutory provision against assignment to secure a prior debt. See pp. 38–39 *infra*.

regulations which he promulgated in 1955.[4] In pertinent part, the regulation provided [20 Fed. Reg. 6511, 6512]:

> *Payment may be assigned to finance making a crop.* A payment which may be made to a farmer * * * under section 8 of the Soil Conservation and Domestic Allotment Act as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.

As related above, Congress enacted the Food and Agriculture Act of 1965 in November of 1965, creating a new class of farm benefits (price support payments and diversion payments) to which farmers participating in the upland cotton program were entitled and providing that those payments could be assigned under Section 8(g). Three months later, in February 1966, the 1955 regulations construing Section 8(g) were

[4] 16 U.S.C. 590d(3) expressly confers upon the Secretary the authority to "prescribe such regulations, as he may deem proper, to carry out the provisions of this chapter."

amended to permit assignments made to secure payment of the cash rent of a farm. 31 Fed. Reg. 2815.[5] In March, a month later, the regulation as thus amended was adopted, together with the protective provisions quoted above at pp. 5–6, to govern the upland cotton program.[6] 31 Fed. Reg. 4884, 4888. Thus, if farmers participating in the upland cotton program, such as petitioners, agreed with their lessors to assign the federal farm payments to which they are eligible under the cotton program to their lessors to secure payment of the cash rent of their farm land, the Secretary would now give effect to this assignment (assuming the other requirements set by statute and regulation had been satisfied[7]).

[5] 31 Fed. Reg. 2815 (Feb. 17, 1966) provides:

> 1. The second sentence of * * * [20 Fed. Reg. 6511, 6512 as set forth above] is amended by inserting immediately before the semicolon at the end of paragraph (a) the following: "and the payment of cash rent for land used therefor."
>
> * * * * *
>
> 2. The last sentence of * * * [20 Fed. Reg. 6511, 6512 as set forth above] is amended by deleting the words "cash or".

[6] Petitioners' complaint is cast solely in terms of the February action amending the interpretation of Section 8(g) to permit rather than exclude assignments to secure the payment of cash rent for farm land. It was the March action, however, which adopted the amended regulation in its entirety, together with various other provisions, to govern the upland cotton program. It thus would appear to be the authority for the March action which is at issue.

[7] The statutory assignment provision, 16 U.S.C. 590h(g), and the regulations thereunder, 7 C.F.R. 709.3 (32 Fed. Reg. 14921, Oct. 28, 1967), also require that an assignment be in writing; be signed by the farmer; be witnessed by specified persons; be without discount; and not be for a pre-existing debt.

Under the upland cotton program, there has been a resurgence of assignments. The Agricultural Stabilization and Conservation Service informs us that in 1968, 73,235 of approximately 667,000 participants in the program assigned $149,091,708.00 of payments, constituting about 19 percent of the total paid to all farmers under the program ($784,000,000). Since this 19 percent was assigned by only 11 percent of the farmers receiving benefits, it is evident that assignments are made extensively by persons at the upper as well as the lower end of the benefit scale. Thus, the figures given produce an average assignment level of approximately $2035 per assignor, as compared to an average benefit level of approximately $1175 per participating farmer. The average assignment [8] was less than $1,000 in Alabama (9,016 assignors), Florida (29), Illinois (7), North Carolina (495), South Carolina (2,886), Tennessee (4,758) and Virginia (2) but more than $2,000 in Arizona (941), California (1,803), New Mexico (903) and Texas (12,938). The statistics do not show, however, what proportion of these assignments were made to secure an obligation to pay cash rent.

Section 8(g) was amended in the fall of 1966, after the Secretary had promulgated the challenged regulations. As amended, the statute permits assignments to finance not only making a crop, but also "handling or marketing an agricultural commodity, or performing a conservation practice." 16 U.S.C. 590h(g) (Supp. IV). A new regulation, in substance the same

[8] The figures reflect the size of the assignments, and not the total income of the farmers receiving them.

as its predecessor, was then issued. It provides (7 C.F.R. 709.3):

> *Purposes for which a payment may be assigned.*
>
> (a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any preexisting indebtedness of any nature whatsoever.
>
> (b) *To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor, and the payment of cash rent for land used therefor, or (2) to provide food, clothing, and other necessities required by the producer or persons dependent upon him.*
>
> (c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm. [Emphasis added.]

3. The district court (Judge Johnson) held that the government's action in permitting, but not requiring, farmers to assign their federal farm payments to secure the cash rent cost of farm land did not invade a legally protected interest of petitioners and that petitioners therefore lacked standing to sue. Alternatively, the court ruled, petitioners failed on the merits. It found that Congress has expressly authorized assignments "to finance making a crop" and "the conclusion is inescapable" that the regulation permitting

assignments to cover payment of cash rent for the land used to grow a crop is "reasonable and consistent with the statute" (R. 54). Accordingly, it dismissed the action against respondent officials of the Department of Agriculture.[9]

The United States Court of Appeals for the Fifth Circuit, Judge Tuttle dissenting, affirmed the dismissal on the ground that petitioners lacked standing. The court noted that petitioners were complaining of "nothing more than an economic consequence permitted, but not required, by government action" (R. 67). The court held that, in order to have standing to challenge governmental action resulting in alleged economic injury, petitioners must demonstrate a legal right to be protected from that injury (R. 65). The court concluded that petitioners had no such right. Specifically, the court ruled that petitioners could demonstrate no property or contract right to be prohibited from assigning their farm payments (R. 65). Furthermore, the court reviewed the relevant statutory provisions and found no "express or implied statutory grant" of standing (R. 65). The statutory provisions involved, the court held, created no right to be precluded from assigning farm payments, but rather evidenced an intent on the part of Congress to expand the areas of permissible assignments (R. 66). The court did not reach the merits.[10]

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[9] The complaint also contained separate claims for relief against petitioners' landlord under the 1964 Federal Civil Rights Act and other statutes. These claims were not dismissed, and the issues they raised are not before this Court.

[10] The court did, however, indicate it rejected petitioners' contention that "making a crop" must be given a technical meaning

In dissent, Judge Tuttle found in the statutory provision a Congressional intent to protect farmers by limiting their rights of assignment. He thus concluded that farmers, such as petitioners, would have standing to enforce that limitation. On the merits, the dissenting judge would have construed the term "to finance making a crop" so as to exclude any costs associated with obtaining land for cultivation, such as cash rent (R. 67–69).

SUMMARY OF ARGUMENT

I

Petitioners can establish their standing to bring this action only if they can show that Congress in passing the assignment provisions of Section 8(g) (16 U.S.C. 590h(g)) and 7 U.S.C. 1444(d)(13) had as a purpose protecting tenant farmers from economic pressure to assign federal farm benefits to meet some of their current farming costs, in this case the cost of renting land on which to farm. There is no personal right to be prohibited from making assignments. The general prohibition on assignment of federal monies arises out of the federal Anti-Assignment Act, 31 U.S.C. 203, which is concerned with the protection of government rather than individual interests; and the right to make an assignment imposes no legal obligation on an individual to act. Nor are there any provisions under the Food and Agriculture Act of 1965 which specifically confer standing on petitioners to seek review of the Secretary's actions under it. Thus, standing can exist

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which would preclude assignments to secure payment of cash rent for farm land (R. 66).

only on the basis of *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1.

Under *Hardin*, petitioners must show, as the *Hardin* plaintiffs did, that the legislation under which they seek relief was designed to protect them from the type of injury of which they complain. It is not sufficient to show generally that the legislation was intended to benefit them, and to assert that it fails to do so. Such a doctrine would not assure that personal stake in the outcome and concreteness of issues which this Court has consistently identified as being at the root of the standing question. It thus could invite substantial litigative interference with government operations through lawsuits where the plaintiffs might lack the incentive to make any arguments but those which they thought could establish a useful principle.

A review of the relevant legislative history makes it doubtful whether one can appropriately assign *any* protective purpose to Section 8(g) and 7 U.S.C. 1444 (d)(13). It shows that Congress was principally concerned with permitting farmers to use their expectancy of receiving federal farm benefits as a means of obtaining financing for their current expenses, with no indication at all of a distinction among the various types of current expenses—such as the cash rent cost of farm land—for the purpose of permitting assignments only as to some. The policy against assignments is supplied principally by the federal Anti-Assignment Act, which has no purpose to protect private interests. The legislative history of 7 U.S.C. 1444(d)(13) mentions only the facilitative, expansive purpose to permit assignments—as does the history of the 1966

amendment to Section 8(g) which expanded its designation of the purposes for which assignments could be made. While the legislative history of Section 8(g) itself contains some indications of concern over the possibility of economic coercion, these related solely to the question of assuring that farmers got full value for their assignments and that the assignment was used to finance current farming needs. Nothing suggests that any distinction was being drawn between one type of current expense, such as that of cash rent for farm land, and another, such as that of seeds. Assignments to landlords were expected, and even encouraged, by the supporters of the enactment; there is nothing to show that landlords were meant to be discriminated against by the assignment provision.

II

Similar reasoning establishes that the regulation defining the expenses of "making a crop" to include the cash rent cost of farm land is valid. Thus, while petitioners view 7 U.S.C. 1444(d)(13) as having been enacted with the landlord-tenant situation particularly in mind, all indications are that it was not. Just because there are such strongly held views about the relationship of landlords and tenants on southern cotton farms, any legislation meant to influence that relationship would have extensive, explicit legislative history revealing that purpose. But there is not even a hint of such a purpose in the records of Congress' deliberations. Rather, the scanty history there is makes clear that Congress was concerned with the ability of *all* cotton farmers to finance current expenses in view of

the changes that were being made in the cotton program. There is nothing to indicate that Congress thought current expenses for farm land any less important in this regard than other current farming expenses, or that it even considered whether a distinction should be drawn between some types of current farming expenses and others for the purpose of permitting assignments. In fact, the assignment provisions are heavily used by relatively large cotton farmers, as there is every indication Congress expected them to be.

In these circumstances, a regulation which defines the phrase "to finance making a crop" to include among qualified expenses the obviously necessary cost (where applicable) of cash rent for farm land is permissible. Although the Secretary for many years excluded that cost from the definition, that neither proves that he could not have included it originally, nor forecloses him from revising his opinion when, as here, Congress extends what had been a basically moribund provision into an entirely separate farm program. In suggesting otherwise, petitioners misuse the maxim that legislative reenactment of a provision ratifies existing administrative interpretations; on only one occasion of which we are aware has that maxim been used to foreclose prospective administrative change in interpretation, as distinct from use to uphold existing regulations, and in that case there was a wealth of legislative history utterly lacking here. Where more than one interpretation is possible, Congress' failure to disapprove an existing interpretation does not show

that it would balk at another. Indeed, as this Court has recognized, any such proposition, freezing administrative regulation into the form it happened to have at the moment of reenactment, "would deprive the administrative process of some of its most valuable qualities." *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 101. The Secretary was entitled to consider the phrase's meaning anew; the meaning he assigned to it is rational and consistent with statutory purpose. Finally, the Secretary's interpretation is not inconsistent with his statutory duty to "provide adequate safeguards to protect the interests of tenants and sharecroppers." 7 U.S.C. 1444(d)(10) (Supp. IV).

ARGUMENT

I

PETITIONERS LACK STANDING UNDER THE TEST OF *HARDIN* V. *KENTUCKY UTILITIES CO.*, 390 U.S. 1 SINCE CONGRESS IN PASSING THE ASSIGNMENT PROVISION INVOLVED DID NOT HAVE AS A PURPOSE PROTECTING TENANT FARMERS FROM ECONOMIC PRESSURE TO ASSIGN FEDERAL FARM BENEFITS TO SECURE PAYMENT OF CURRENT FARM-RELATED COSTS

Petitioners assert that by permitting, albeit not requiring, them to make assignments of their federal farm benefits to secure their payment of cash rent for farm land, the Secretary's regulation exposes them to economic coercion by their landlords so to assign, which it was a major purpose of Section 8(g) and 7 U.S.C. 1444(d)(13) to avoid. If they are correct in thus assessing the purpose of the legislation, then they have shown a protected interest and thus have the

requisite standing to challenge the regulations which permit them to make such assignments under the principles explained by this Court in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1. But in our view, their claim of standing rests solely on their ability to demonstrate such a specific purpose. For "something more than an 'adversary interest' is necessary to confer standing [to challenge government action]. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action." *Jenkins v. McKeithen*, 395 U.S. 411, 423. See also *Railroad Co.* v. *Ellerman*, 105 U.S. 166, 173–74; *Alabama Power Co* v. *Ickes*, 302 U.S. 464, 479; *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137–138; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125.

A. UNLESS PETITIONERS SATISFY THE *HARDIN* STANDARD, THEY LACK STANDING

As petitioners themselves at least implicitly recognize, the only arguable basis for standing in this case is their assertion that 7 U.S.C. 1444(d)(13) and, through it, Section 8(g) were meant to protect them against the consequences of being able to assign federal farm benefits for some types of farm costs, including the cost of cash rent for farm land. For there is no general right to have governmental restrictions placed on a person's freedom to assign monies which he may receive from the government or others. The statute which prohibits such assignments generally, the federal Anti-Assignment Act, 31 U.S.C. 203, was adopted to protect the interests of the government in the efficient handling of its obligations, not private

citizens. *Price* v. *Forrest,* 173 U.S. 410, 423; *Segal* v. *Rochelle,* 382 U.S. 375; 384; *United States* v. *Shannon,* 342 U.S. 288, 293; *Hobbs* v. *McLean,* 117 U.S. 567, 576; *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 373. As to an individual, the failure to impose such a restriction would free rather than hinder his acts; it would require him neither to make nor to refrain from making assignments. Thus, an act lifting the general ban on assignments on its face "imposes no obligation [upon the person made eligible to assign] but simply extends an option which * * * [he] is free to accept or reject." *Massachusetts* v. *Mellon,* 262 U.S. 447, 480. Petitioners cannot complain of any invasion of legally protected rights or interests unless they can show that Congress' partial lifting of the ban as to them had a protective as well as the apparent facilitating function.

Nor does the Food and Agriculture Act of 1965 expressly recognize a right of tenant farmers to challenge judicially the Secretary's regulations adopted under the Act in court. Unlike many other agricultural acts establishing specific agrarian programs, see, *e.g.,* 7 U.S.C. 1365–1366 (Agricultural Adjustment Act of 1938); 7 U.S.C. 608c(15)(B) (Agricultural Agreement Act of 1938), the 1965 Act contains no provision for judicial review of actions of the Secretary of Agriculture. The 1965 Act does not contain any general provision for review of the Secretary's actions by persons "aggrieved" [11] or "adversely affected", [12] which

[11] *E.g.,* Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a).

[12] *E.g.,* Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1).

confers standing upon such persons to assert a public interest as a "private Attorney General." See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C.A. 2), certiorari vacated as moot, 320 U.S. 707.

B. *HARDIN* REQUIRES THAT PETITIONERS SHOW NOT SIMPLY THAT SECTION 8(g) WAS INTENDED TO BENEFIT THEIR CLASS IN A GENERAL WAY, BUT THAT THE SECRETARY'S ACTION THREATENS A SPECIFIC INTEREST OF THEIRS WHICH THE STATUTE WAS DESIGNED TO PROTECT

Hardin involved a suit by a private electric utility company to enjoin the Tennessee Valley Authority (TVA) from supplying power to a certain geographic area in competition with the plaintiff. The private utility alleged that the expansion of TVA service to the area violated an express statutory provision, section 15d of the TVA Act of 1933, as amended, limiting the geographical area within which TVA could supply electricity. The parties conceded, and this Court found after reviewing explicit legislative history on the point, that "one of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition." *Id.*, 390 U.S. at 6. This Court concluded that since plaintiff private utility was in the class Section 15d was designed to protect *from the specified injury of competition* and the utility was complaining of that injury, it had standing judicially to bring suit.

Although petitioners at various points in their brief appear to assert that it would be sufficient to confer standing on them to show that they were the intended beneficiaries of Section 8(g) and 7 U.S.C. 1444(d)

(13), *e.g.*, Pet. Br. pp. 17–18, we submit that *Hardin* requires something more. If it were sufficient to confer standing on an individual simply to show that in a general way he was the intended beneficiary of legislation and that the action proposed did not benefit him—if a farmer could challenge any administrative action under any farm legislation on the theory that the legislation was intended to, but the Secretary's act did not, benefit him—the doctrine would no longer assure the "personal stake in the outcome of the controversy [and] * * * concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 369 U.S. 186, 204. A standard so malleable would invite "ill-defined controversies over constitutional issues," *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90, and the bringing of cases which, because they were meant more to establish a point than to vindicate a concrete and pressing personal interest, would have a "hypothetical or abstract character." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240. There must be "a logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen*, 392 U.S. 83, 102, and that nexus must be sufficient to give confidence that every aspect of the situation will be explored. *United States* v. *Freuhauf*, 365 U.S. 146, 157. The "beneficiary" standard petitioners propose ignores these important considerations, and could lead to substantial litigative interference with government operations.

In order to infer standing from a statute that does not expressly confer it, petitioners must show that it was enacted to protect them from the specific type of injury of which they complain.

C. IF THE LEGISLATIVE HISTORY OF SECTION 8(G) AND 7 U.S.C. 1444(d)(13) SHOWS ANY PURPOSE TO PROTECT SMALL FARMERS FROM ECONOMIC PRESSURE TO ASSIGN FEDERAL FARM BENEFITS, THAT PROTECTION WAS NOT MEANT TO EXTEND TO ASSIGNMENTS RELATED TO THEIR CURRENT COSTS OF FARMING

It is doubtful whether one can appropriately assign *any* protective purpose to the action of Congress in enacting Section 8(g) and 7 U.S.C. 1444(d)(13). As already noted, *supra* pp. 18–19, the prohibition on farmers' (and others') assignments of federal monies arises not from farm legislation but from the federal Anti-Assignment Act, 31 U.S.C. 203, which imposes a general prohibition on assignments. Since the purpose of the Anti-Assignment Act is to protect government, not private, interests, no private citizens would appear to have standing to enforce its bar under *Hardin,* even if the government's interests in a particular case happened to coincide with his own.

Section 8(g) and 7 U.S.C. 1444(d)(13) create exceptions to this general prohibition, for the apparent purpose of facilitating farmers' financing of their farm activities. Indeed, the legislative history of the latter speaks only of this facilitative, expansive purpose: the congressional reports note that the legislation would permit cotton farmers to assign their "price support and diversion payments to private lending agencies in obtaining production loans." H. Rep. No. 1123 (Conf. Rep.); 89th Cong., 1st Sess., p. 33; see H. Rep. 631, 89th Cong., 1st Sess., p. 3 (1965). Congress reiterated this expansive view a year later, when in 1966 it amended Section 8(g) to provide

a broader statement of farmers' assignment rights.[13] There are no contemporary voices of caution warning of the effect a broader assignment right might have on the economic position of tenant farmers or other small farmers vis-à-vis their landlords or other suppliers. To the extent the language of the statute thus appears to represent a congressional balance between farmers' perceived needs to assign and the government's interest in restricting assignments, petitioners have no standing to complain that they were favored in the assessment.

As we noted in our opposition to the petition for certiorari, pp. 11–12 and note 7, the legislative history of Section 8(g) could be read to show concern for the economic pressures small farmers might experience to make unfavorable assignments. In the House, this apparent concern took the form of limiting the persons to whom assignments could be made to landlords—the very persons whose alleged economic power to compel assignments is sought to be avoided in the present action. 82 Cong. Rec. 844–845 (1937). In the Senate, a sweeping exemption for farmers from the Anti-Assignment Act was twice proposed by Senator Bilbo of Mississippi, and twice defeated after objec-

[13] *Supra*, p. 10. We do not rely on the 1966 amendment, as petitioners suppose, as a specific ratification of the Secretary's understanding of "to finance making a crop" to include the expense of cash rent. What is significant, in our view, is that in successive years, straddling the challenged regulation, Congress adopted statutory provisions facilitating assignment by farmers in response only to statements of the need for making assignments easier. In the absence of legislative reference to any need for caution in permitting assignments in order to protect farmers' economic interests, it seems unreal to suppose that such a need was known to the Congress, concerned it, or shaped its acts.

tions were voiced that unsophisticated farmers might be forced or induced by economic circumstances to assign away their rights to speculators for a fraction of their worth. 82 Cong. Rec. 1755–1756, 1766 (1937). The conference then reported, without substantial explanation, Section 8(g) as it read until the 1966 amendments. That is, any farmer—not just a tenant—could make an assignment to any person—not just his landlord—so long as it was (1) in writing; (2) not made to secure a pre-existing debt; (3) made without discount; and (4) "to finance making a crop." H. Rep. No. 1767, 75th Cong., 3d Sess. 60 (1938).

Thus, it appears possible that the 75th Congress tempered its willingness to expand farmers' rights to assign federal benefits with an understanding of the circumstances in which such assignments could prove a poor bargain. But as petitioners recognize, Pet. Br. 30–31, the limitations imposed were designed to see that the farmer got a fair bargain, not to prevent him from making one. Thus, assignments were to be made in writing; they were to be made for full value; and they were to be made for present value, not to meet past debts. Each of these limitations responded to the considerations which had been voiced in the debate, chiefly that farmers would be forced by economic circumstances to assign payments at severe discount, or otherwise be denied assistance in meeting their current financial needs.

There remains the phrase "to finance making a crop." In the government's view, the legislative history does not justify treating this as anything more than a reference to farming costs in general. Such a

reference is readily explained as an effort to advance *government* interests by assuring that the federal funds would aid the faltering farm economy—not necessarily an attempt to protect farmers as such. Moreover, the petitioners' attempt to invest it with a tight technical meaning founders on several shoals—the antiquity and remoteness of the cases they rely upon to show that meaning;[14] the utter absence of the kind of indication one ordinarily finds, where Congress has knowingly used a possibly technical term, that it understands and means the technical meaning to apply;[15] and the immediate administrative inter-

[14] *Texas & Pacific Ry. Co.* v. *Bayliss*, 62 Tex. 570, 574, held in 1884 that when a farmer claiming damage from a railroad pleaded the crop he would have "made," he was referring to the crop he would have harvested and not the value of the crop as it stood in the field at the moment of damage. The dissent in *Driver* v. *Maxwell*, 56 Ga. 11, 20, was of the opinion in 1876 that a rental contract which called for a share of the crops "made" on the land required the share to be calculated at the moment of harvest rather than later—such as at marketing time—when substantial losses may have occurred. Neither case is in any way concerned with the question whether the cash rent cost of farm land is an expense of "making a crop," and both are as consistent with an affirmative as with a negative answer to that question.

[15] Two comprehensive American dictionaries contemporary to Section 8(g) fail to reflect any tight, technical meaning. The 1937 volume of Merriam-Webster's New International Dictionary, Second Edition, gives no definition of "making a crop" in its list of technical usages of the verb "make." At 1485. It does use the phrase "to *make* a full crop of grain" as an example of a subsidiary meaning, to gain, acquire, or attain, *ibid.*, sense 34, but it is entirely consistent to view the cost of cash rent as one of the expenses of making a crop in that sense. Similarly, A Dictionary of American English, Vol. III, p. 1473 (1942), gives as a usage of the verb "make" to "bring (a growing crop) to maturity; to produce (a crop)," quoting several examples from American writers; neither the usage nor the examples sug-

pretation of the phrase to include a much wider class of expenses than the proposed technical meaning could possibly support.[16] Finally, the legislative origins of Section 8(g), with southern legislators willing to trust the landlord above all others, and the existence then of a pattern of landlord financing of tenants' and sharecroppers' expenses which has persisted almost unchanged until today, both belie the notion that Section 8(g) was meant radically to revise tenant-landlord relationships through federal purchase of the tenants' economic independence.

There was, indeed, an emphasis on fairness between tenants and landlords in dividing the federal benefits paid for any one farm, *e.g.*, Section 8(e), 16 U.S.C. 590h(e); a landlord who increased the rent to soak up the monies made available by federal benefits would have been and still would be in plain violation of federal law. 7 C.F.R. 722.817. But there is nothing to show that Congress meant to alter the existing landholding arrangements, either through the words "to finance making a crop" or through any other language in the act. Only such intent—which one would expect to find

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gest any basis for concluding that a reference to the expenses of making a crop would comprehend some, but not all, of the costs the farmer making it would have to pay. Nor is such a basis any more apparent in the more recent Dictionary of Agriculture and Allied Terminology (1962), on which petitioners rely (Br., p. 11). See also Merriam-Webster's Third New International Dictionary, p. 1363 (1961), which defines making a crop as a dialect variant of the South and Midlands, meaning "to plant and raise (a crop)." Cash rent for farm land is a cost of this activity.

[16] *E.g.*, food and clothing for the farmer and his family and the cost of conservation practices.

explicitly stated in the history of the act if it existed—could supply the strained meaning for which petitioners contend.

Nor can it be objected that this discussion trenches too closely on the merits. For as we understand *Hardin*, the question whether petitioners are members of a class complaining of an injury against which they were to be protected is a rather specific one. Here, where the immediately relevant legislation, the Act of 1965, shows no evidence of any protective motivation, and the principal motivation even of Section 8(g), viewed against the background of the Anti-Assignment Act, must be seen to have been expansive rather than protective, the conclusive and direct legislative history which characterized *Hardin* is entirely lacking. Even if one nonetheless concludes that Section 8(g) was meant in substantial part to protect farmers' interests in not being subjected to economic coercion, we think it incumbent on petitioners to show that Congress recognized that such coercion could be applied as to some but not all types of current farming costs and meant by its reference to "making a crop" to distinguish those types from the others.[17] Petitioners have not made that showing.

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[17] The fact that the Secretary distinguished between various types of farming costs, permitting assignments for some but not for land costs, demonstrates no such recognition. Assignments to pay the purchase price of land were in effect precluded by the prohibition against assigning to pay pre-existing debts. Assignments against commodity rents or share rents are difficult to administer, since the value of the rent cannot be fully known before the harvest, and the rent itself is generally paid in kind. The Secretary may have precluded assignments for cash rent

II

THE REGULATION DEFINING THE EXPENSES OF "MAKING A CROP" TO INCLUDE THE CASH RENT COST OF THE LAND ON WHICH A CROP IS GROWN IS A VALID INTERPRETATION OF THE STATUTORY PHRASE

Should this Court disagree with the court of appeals' conclusion that petitioners lack standing, it would be appropriate to remand the matter to that court so that it may first pass upon the merits of the controversy. See, *e.g., Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463. However, since this Court's grant of the petition for certiorari was unlimited and petitioners discuss the merits at length, we set forth below our reasons for believing that the challenged regulation is a valid interpretation of the statutory provisions involved.

A. INCLUSION OF CASH RENT COSTS IS CONSISTENT WITH THE STATUTORY LANGUAGE AND PURPOSE

The basic issue on the merits is what the statutory phrase "to finance making a crop" means or, within the limits that always inhere in any discussion of legislative purpose, what Congress intended the language to accomplish. Petitioners view the phrase as meaning all costs associated with growing a crop except those of the land on which it is grown, and claim that if it is thus interpreted tenant farmers on southern farms will be able to use the assignable

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at that time merely to avoid the appearance of creating pressure on landlords to switch to a cash rent system (under which the tenant has substantially greater independence than other rent systems), or because there was no great need for such financing at that time. Compare text at pp. 38–39 *infra*.

funds to secure greater economic independence of their landlords than they have had previously. Whether or not such a change is desirable—if, indeed, adoption of petitioners' view could bring it about—there is utterly no evidence that Congress understood or meant the language it used to accomplish it. As petitioners themselves recognize, the "theory of the federal agricultural programs * * * has not been directly to reform one-sided economic relationships in the rural South but rather to prohibit landowners' manipulation of those traditional relationships so as to deprive small producers of their fair share of federal benefits." Pet. Br., p. 30. Any change in that theory would be reflected in legislative history of a sort petitioners are unable to cite.

Rather, as we now show, the legislative history reveals no more precise a purpose than the desire to assist farmers in financing the expenses of farming, in this case by making it possible for them to assign the farm benefits they expect to receive [18] against their current costs. Nothing in that purpose suggests any distinction between the current cost of land and the current cost of other necessaries of farming, and the plain meaning of the words used readily includes both. Certainly, if the phrase "to finance making a crop" includes farming costs as indirect as those of food and clothing for a farmer's dependents, as peti-

[18] As shown above at p. 4 n. 2, the Secretary has authorized part payment of anticipated federal benefits in advance of the growing season only as to the payments made for diverting land from cotton production to conservation uses, and not with respect to price support payments or loans. No diversion payments were made in 1969.

tioners agree (Pet. Br. 30 n.), it also includes the cost of obtaining the land on which he farms.

There is neither a statutory definition of "to finance making a crop" nor any statutory distinction among assignments which "finance making a crop" for the purpose of permitting some and prohibiting others. There is no discussion in the limited history of Section 8(g) to suggest a limited meaning for the phrase and, as shown above at notes 14 and 15, even accepting the phrase as synonymous with acquiring, producing, or planting and raising a crop, there is nothing to indicate that in permitting assignments to finance that activity Congress meant to connote any technical or special meaning narrower than necessary farming costs in general. The cost of renting land is such a cost, and there is no indication that Congress rejected the notion that that expense should be so considered. To the contrary, the legislative history of Section 8(g) is clear that both houses of Congress acquiesced in the notion that assignments could be made to landlords. See 82 Cong. Rec., *supra,* at pp. 844, 1755–1756.

Putting aside for the moment the question whether Congress tacitly adopted the Secretary's existing definition of "making a crop" when it enacted 7 U.S.C. 1444(d)(13), nothing express in the sparse legislative history of that provision suggests any congressional recognition of or desire to distinguish among various types of current farming costs in permitting assignment of farm benefits. Indeed, only two brief sentences about the provision appear in the whole of the 1965 Act's legislative history. One states only that it incorporates by reference the provisions of Section 8(g)

permitting assignments. H. Rep. No. 631, 89th Cong., 1st Sess. p. 40 (1965). The other states that the Act would permit cotton farmers to assign their "price support and diversion payments to private lending agencies in obtaining production loans." *Id.* at p. 3; H. Rep. No. 1123, 89th Cong., 1st Sess. p. 33 (1965). Loans to finance farm production, again, are entirely consistent with all kinds of current farming costs—current land costs as well as current costs of seed, tools, clothing, food, or conservation measures. Given the purpose petitioners discern in a distinction between land and other costs—to enable them to obtain economic independence of their landlords—one may be sure that had a distinction been meant, it would have been noted and explained.

Moreover, widespread use of assignments under the upland cotton program, among farmers receiving a high level of benefits as well as farmers who receive only a little,[19] makes clear that 7 U.S.C. 1444(d)(13) is not aimed at the landlord-tenant situation or intended principally for tenants' benefit, as petitioners tacitly assume.[20] Rather, it was intended to benefit *all*

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[19] As noted in the Statement, *supra*, p. 10, the average assignment under the program substantially exceeds the average benefit paid. In Arizona, the average assignment (for 941 farmers) is almost $20,000; in California (1,803 farmers) it exceeds $9,500.

[20] The legislative history's reference to "private lending agencies" is a further indication that Congress in enacting 7 U.S.C. 1444(d)(13) was concerned with the financing needs of all farmers, not specifically the landlord-tenant situation. Under Section 8(g), landlords had been major recipients of assignments, albeit in that case not for rent. However, the phrase is

farmers under the program by facilitating their financing of current farm expenses at a time when, as Congress clearly recognized,[21] their federal benefits in other respects were being curtailed. Petitioners suggest no reason why farmers generally would wish to be disabled from making assignments to secure the payment of rent for farm land, as distinct from their other current farming costs.[22]

In the absence of any Congressional definition or limitation of the statutory phrase "to finance making a crop," the Secretary of Agriculture, as administrator of the program affected by the assignment provision and as the person having the necessary experi-

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not necessarily all-inclusive, and in any event a landlord extending credit, whether for seed, food, clothing, or rent, could be considered such an agency.

[21] H. Rep. No. 631, *supra*, at 5–6, 28–30; S. Rep. No. 687, 89th Cong., 1st Sess., 2, 6–7, 55–57 (1965); H. Rep. No. 1123, *supra*, at 32–34.

[22] Although in 1935 there were about four times as many tenant farmers (2.9 million) as farmers who owned some land and rented additional land on which to farm (0.7 million), in 1964 part owners outnumbered tenant farmers (800,000 to 500,000) and rented almost twice as much land (approximately 250 million acres to 150 million). United States Department of Agriculture, *Land Tenure in the United States, Development and Status*, p. 35 tables A–5, A–6 (1969) (hereinafter *Land Tenure*). "Although these part owners accounted for one-fourth of all farms in 1964, they operated almost half the land in farms." *Id.* at 14. By contrast, tenant farmers operated 13.1 percent of the nation's farmland, *id.* at 35, table A–6. Although the cited study does not provide statistics on tenure patterns relating to particular crops, such as cotton, it does tend to refute the notions that primarily tenant farmers were affected by the extension of Section 8(g) and 7 U.S.C. 1444(d)(13) assignments to the financing of cash rent, and that the enactment of the latter provision was principally concerned with their needs.

ence and expertise in agricultural matters, is responsible for defining the phrase to carry out the statute's purpose. As long as the phrase remains undefined by statute, he is free to revise his opinion as changing circumstances or uses of the provision seem to require. That is, the fact that he excluded "cash rent" from the permissible class of assignments in 1938 neither proves that he could not have included it then, nor of itself forecloses him from including it at a later date. Unless he was obliged to give the broadest possible meaning to the statutory phrase or an examination of the legislative history convinces that in fact he did so, his initial interpretation, of itself, poses no barrier to subsequent revision. He was under no such obligation and, as we have shown, the legislative history is not conclusive.

We thus come to the question whether congressional enactment of 7 U.S.C. 1444(d)(13) while the initial interpretation was in effect served to elevate that interpretation into a statutory rule, no longer subject to regulatory change. In our view, petitioners' contention that the enactment of 7 U.S.C. 1444(d)(13) did freeze the 1938 regulation into the statute is a questionable use of the ratification-by-subsequent-legislation theory, and one particularly inappropriate for this case.

In general, the theory that legislative reenactment of a provision ratifies existing administrative interpretations, and the similar maxim favoring administrative constructions of a statute made contemporaneously with its enactment, are used to validate controversial administrative acts rather than to invalidate subsequent changes. *E.g., Norwegian Nitrogen Products Co.* v.

United States, 288 U.S. 294; *Udall* v. *Tallman*, 380 U.S. 1; *Massachusetts Trustees* v. *United States*, 377 U.S. 235. Used as validating devices, they can be valuable tools of interpretation. *Massachusetts Trustees, supra*, at 241–242. Where questions exist as to the validity of a regulation at the time of a statute's reenactment, it may be supposed that those questions come to Congress' attention and it is appropriate to conclude that by reenactment they are resolved in favor of validity. Similarly, since the first administrators of a statute can be expected to have a sound understanding of congressional purpose, an interpretation which they adopt and which goes unchallenged for many years may be thought to acquire a presumption of reasonableness.

The same logic does not suggest, however, that subsequent change in the regulations is invalid.[23] If

[23] In only one recent case of which we are aware has this Court held prospective administrative "rule-making" to be foreclosed by the interaction of past legislative and administrative actions. *United States* v. *Leslie Salt Co.*, 350 U.S. 383. In that case the question was whether certain instruments, promissory notes on their face and as such nontaxable, could be characterized as taxable debentures and certificates of indebtedness. There had previously been a tax on promissory notes, which had been repealed in 1924; the Treasury had adopted an *ad hoc* policy of taxing such instruments after a 1947 success in a court of appeals case. The question was one of major tax significance. The Court held the instruments nontaxable, denying effect to the *ad hoc* policy, even prospectively, as inconsistent with prior congressional and administrative action. In these circumstances, however, there had been a specific congressional judgment that promissory notes should not be taxed, a judgment which was never revised, and the reference to administrative practice—although stated to be crucial—appears in fact to have been a make-weight. The Treasury could have no

more than one valid interpretation is possible, Congress' failure to disapprove an existing interpretation does not establish that a subsequent interpretation is invalid. Moreover, if there is no question about the validity of an existing regulation, there is little reason to suppose that Congress in reenacting the statute has considered the question whether that is the only possible valid regulation under the scheme. Its failure to disapprove one regulatory interpretation does not show that it would balk at another. See *National Labor Relations Board* v. *Seven-up Bottling Co.*, 344 U.S. 344, 350–352; *Interstate Drop Forge Co.* v. *Commissioner of Internal Revenue*, 326 F. 2d 743, 746 (C.A. 7); Davis, *Treatise on Administrative Law* (1958), § 5.07.

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authority to resurrect a tax which, as it previously had recognized, Congress had expressly considered and laid to rest.

The other cases in which this Court refused to give effect to changed administrative policy on the basis of prior policy ratified by congressional action, all also tax cases, presented the issue whether *retroactive* effect could be given the change. Thus, in *Fribourg Navigation Co.* v. *Commissioner of Internal Revenue*, 383 U.S. 272, the issue was whether a 1962 Revenue Ruling could be applied to a 1957 transaction; *Helvering* v. *Griffiths*, 318 U.S. 371, also explicitly concerned itself with retroactivity problems. And compare *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, with *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90. In such circumstances there are apparent equities for permitting the taxpayer the benefit of prior law.

Moreover, all of these cases were tax cases, involving important, recurring problems of construction under a law which Congress frequently and carefully examines. The hypothesis of congressional adoption is far more appealing where such examination has taken place than in a case like the present one, in which there is absolutely no evidence of congressional concern with the problem to which petitioners address themselves.

Even where a vital, specific program has been continued in operation through congressional reenactment of a statute, this Court has refused to infer that prior administrative interpretations of the statutes involved were thus frozen immutably into the scheme:

> * * * The oft-repeated statement that administrative construction receives legislative approval by reenactment of a statutory provision, without material change * * * does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers * * *. Such dilution of administrative power would deprive the admintrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations. * * *

Helvering v. *Wilshire Oil Co.*, 308 U.S. 90, 100–101; see *Helvering* v. *Reynolds*, 313 U.S. 428, 432. See also *National Labor Relations Board* v. *Seven-Up Bottling Co., supra.*

Here, such an inference would be particularly inappropriate. As noted in the statement, *supra*, p. 7, Section 8(g) ceased to be a significant source of farm financing during World War II, when commodity payments ceased to be made under the 1938 Act of which it was a part. By 1952, less than 0.1 percent of farmers eligible to assign payments in conservation programs were doing so,[24] and the Secretary of Agri-

[24] By way of comparison, over ten percent of eligible farmers made assignments under the upland cotton program in 1968.

culture had called for Section 8(g)'s repeal. If Congress was aware of the history of the section and its interpretation at all, it was aware of this long period of disuse. "However, the scanty legislative history accompanying [the] reenactment gives no hint that Congress knew of these particular regulations, much less of the indirect impact which [petitioners] now ascribe to them." *Leary* v. *United States,* 395 U.S. 6, 24; *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.,* 348 U.S. 426, 431; *United States* v. *Calamaro,* 354 U.S. 351, 359.

Thus, 7 U.S.C. 1444(d)(13) must be viewed as new legislation, albeit in a borrowed form, and the Secretary should be free to interpret it in any way that furthers the purpose of the Act with which it is associated in a manner consistent with the statutory words. Even though the regulation petitioners challenge was first adopted in the form of an amendment to the regulations under Section 8(g) and a month later carried over to govern 7 U.S.C. 1444 (d)(13), both the moribund state of Section 8(g) and the timing of the change (shortly after the 1965 Act was enacted) establish that the interpretation was adopted with the needs and circumstances of the upland cotton program foremost in the Secretary's mind.

The Secretary acted reasonably in interpreting "to finance making a crop" as encompassing assignments to secure the payment of cash rent for farm land. Such payments are well within the plain meaning of the words Congress used. He has traditionally given a broad meaning to the phrase, including the cost of food and clothing for the farmer's family and con-

servation practices together with the costs of seed, fertilizer, and farm equipment. Indeed, if it is appropriate to apply a theory of congressional ratification in this case, the more probable conclusion is that Congress in enacting 7 U.S.C. 1444(d)(13) in 1965 and then amending Section 8(g) in 1966, after the challenged regulation was promulgated, endorsed the Secretary's expansive, facilitative approach to the meaning of the assignment provisions.[25] Assignments to secure rent are consistent both with this approach and with the predominant purpose of the provision—to provide additional financial assistance to farmers to aid them in obtaining the necessaries of farm production, including in some cases land on which to farm. The Secretary could readily have determined that the revision of the cotton program in the direction of lower support prices brought about by the 1965 Act justified making this additional financing tool available to secure payment of farmers' cash rent costs as well as their other necessary farming costs.[26] Compare, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16–17; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131.

[25] As noted above, p. 10, the amendment expanded the statutory designation of circumstances in which assignments could be made.

[26] In 1964, in the nation as a whole, 42 percent of the nation's farmers, farming over 61 percent of its land, were under an obligation to pay rent, either as tenants or as part owners. *Land Tenure*, p. 14 table 4. In 1964, farmers in the South renting land as part owners or on a cash basis had farms which, in general, exceeded the average value of a farm in that region, *id.* at 37 table A–10. Although it is clear that this generalization does not apply to nonwhites in the South, *id.* at 18 table 5, it again calls into question petitioners' assertion that the change in interpretation was directed at them. Compare n. 22 *supra*.

B. THE REGULATION PERMITTING ASSIGNMENTS TO SECURE PAYMENT OF CASH RENT IS NEITHER INTERNALLY INCONSISTENT NOR PROHIBITED BY THE SECRETARY'S STATUTORY OBLIGATIONS TO "PROVIDE ADEQUATE SAFEGUARDS TO PROTECT THE INTERESTS OF TENANTS AND SHARECROPPERS"

1. Petitioners contend that the regulation is fatally inconsistent because it permits assignments to secure the payment of cash rent, while prohibiting such assignments to secure payment of commodity rent or the purchase price of land. Since Section 8(g) simply permits assignments, without requiring them, the complaint would be more appropriate if made by farmers who wished to make assignments for the latter two purposes; any irrationality in exclusion would not seem to affect persons covered by the provision.

In any event, the exclusions are not fatal to the regulation. The statute specifically prohibits assignments to secure pre-existing indebtedness, so that an assignment towards purchase price could be made only in the year of sale. To avoid any problems of misunderstanding, or on the basis of a judgment that such non-recurring costs were not within the ambit of congressional purpose, the Secretary could properly decline to recognize such assignments even in the year of sale. While it would be possible on our analysis to interpret the statute to permit assignments to secure the payment of commodity rent, there are practical considerations justifying the Secretary's decision not to do so. Commodity rent is usually expressed in terms of a fixed quantity of crops, payable at harvest; its ultimate value is therefore uncertain,

even though there may be a federal support floor under the price. Disputes can arise as to the quality or quantity of the crops delivered (*e.g., Driver* v. *Maxwell, supra*) and there may be special arrangements for sharing the risk of a bad crop year. Since the assignment of federal benefits only secures the primary rent obligation, the Secretary may have been reluctant to enmesh federal administrators in this potentially complex arrangement. And our understanding is that commodity rent arrangements are no longer common; there may have been no apparent reason to change.[27]

2. The regulation is not inconsistent with the Secretary's obligation to "provide adequate safeguards to protect the interests of tenants and sharecroppers" under the Act, 7 U.S.C. 1444(d)(10). As has been shown, nothing in the history of 7 U.S.C. 1444(d)(13), the assignment provision of the 1965 Act, suggests that its enactment was thought to be of particular relevance to tenants and sharecroppers, or that it was meant for their protection. Indeed, the substantial volume of assignments by relatively large beneficiaries under the Act indicates the contrary, that the assignment provision was meant for the benefit of all cotton farmers under the Act. Although petitioners have not relied on the Secretary's obligation adequately to

[27] *Land Tenure*, p. 15. The fact that there were neither rule-making proceedings nor findings when the regulations were promulgated does not undermine their validity, as petitioners imply. Such proceedings are not required for matters "relating to * * * public property, loans, grants, benefits, or contracts." 5 U.S.C. 553(a)(2) (Supp. IV).

safeguard the interests of tenants and sharecroppers as a basis for attacking the regulation, and indeed seem to reject its application in this Court, Pet. Br. 39–40, it is in our view the only provision of the Act specifically directed to their interests.

Viewed as a whole, the regulations protect tenants, even those who make assignments to secure the expense of cash rent, from unfair diversion of federal benefits from them to their landlords. Under those regulations, set out above at pp. 5–6, a landlord's benefits must be denied if he unfairly exacted a contract of a tenant, the effect of which is to force the tenant to pay the landlord what the tenant earns under the program or to raise the rent, in anticipation of federal benefits being paid. The Department of Agriculture has informed us that although, in its view, a landlord may insist that his tenant provide adequate security for the year's rent, it would violate the regulations for the landlord to insist that that security could be provided only through an assignment to him. Thus, if the tenant were able to secure an alternate means of financing, as by an assignment to a bank or cooperative, the landlord could not insist that the tenant finance his crop through him. Before assignments of federal benefits were possible, a tenant could give neither his landlord nor any other of his creditors a security interest in those benefits as a means of financing the necessary expenses of farming. Now that such assignments are possible, the challenged regulation permits the landlord the same access to that security as all other creditors of a tenant could obtain. In itself, this is neither manipulation nor an unfair diversion of funds, and

the existing regulations provide the necessary safeguards against the possibility that the access thus provided will be abused.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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OCTOBER 1969.

APPENDIX

7 U.S.C. 1444(d)(10), 79 Stat. 1196 (1965) (Supp. IV, 1965–68), provides:

> The Secretary shall provide adequate safeguards to protect the interests of tenants and sharecroppers, including provision for sharing diversion payments on a fair and equitable basis under this subsection. * * *

7 U.S.C. 1444(d)(13), 79 Stat. 1196 (1965) (Supp. IV, 1965–68), provides:

> The provisions of section 590h(g) of Title 16 (relating to assignment of payments), shall also apply to payments under this subsection.

Section 8(g) of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35 and 205 (1938), ~~16 U.S.C. 590h(g) (Supp. IV)~~ provides:

> (g) A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop. Such assignment shall be signed by the farmer and witnessed by a member of the county or other local committee, or by the treasurer or the secretary of such committee, and filed with the county agent or the county committee. Such assignment shall include the statement that the assignment is not made to pay or secure any preexisting indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary or any disbursing agent if payment to the farmer is made without regard to the existence of any such assignment. * * *

Section 8(g) of the Soil Conservation and Domestic Allotment Act, as amended, 80 Stat. 1167 (1966), 16 U.S.C. 590h(g) (Supp. IV, 1965–68), provides:

> (g) Assignment of payment; procedure for assignment; rules and regulations.
>
> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice. Such assignment shall be signed by the farmer and witnessed by a member of the county committee or by an employee of such committee, except that where the assignee is a bank whose deposits are insured by the Federal Deposit Insurance Corporation, the Farmers Home Administration, or a production credit association supervised by the Farm Credit Administration, such assignment may be witnessed by a bonded officer of the lending institution. Such assignment shall be filed with the county committee. Such assignment shall not be made to pay or secure any preexisting indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary or any disbursing agent if payment to the farmer is made without regard to the existence of any such assignment. The Secretary shall prescribe such regulations as he determines necessary to carry out the provisions of this subsection.

20 Fed. Reg. 6511, 6512 (Sept. 3, 1955) provides:

> *Payment may be assigned to finance making a crop.* A payment which may be made to a farmer * * * under section 8 of the Soil Conservation and Domestic Allotment Act as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of

equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity for rent for a farm.

31 Fed. Reg. 2815 (Feb. 17, 1966) provides:

1. The second sentence of * * * [20 Fed. Reg. 6511, 6512 as set forth above] is amended by inserting immediately before the semicolon at the end of paragraph (a) the following:

"and the payment of cash rent for land used therefor."

* * * * *

2. The last sentence of * * * [20 Fed. Reg. 6511, 6512 as set forth above] is amended by deleting the words "cash or".

32 Fed. Reg. 14921 (Oct. 28, 1967), 7 C.F.R. 709.3 (1968) provides:

Purposes for which a payment may be assigned.

(a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any preexisting indebtedness of any nature whatsoever.

(b) To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor, or (2) to provide food,

clothing, and other necessities required by the producer or persons dependent upon him.

(c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm.

32 Fed. Reg. 2935 (Feb. 16, 1967), as amended, 32 Fed. Reg. 6127 (April 19, 1967) (7 C.F.R. 722.817, 794.3 (1968)) provides:

> [Diversion and price support payments] "shall not be approved for payment by the county committee if the county committee determines that any of the following conditions exist * * *.
>
> (1) The landlord * * * has not afforded his tenants and sharecroppers an opportunity to participate in the program;
>
> (2) The landlord * * * has, in anticipation of or because of participating in the program, reduced the number of tenants and sharecroppers on the farm * * *.
>
> (3) There exists between the * * * landlord and any tenant or sharecropper, any lease, contract, agreement or understanding unfairly exacted or required by the * * * landlord which was entered into in anticipation of participating in the program, the effect of which is:
>
> (i) To force the tenant or sharecropper to pay over to the landlord * * * any payment earned by him under the program;
>
> (ii) To change the status of any tenant or sharecropper so as to deprive him of any payment or right which he would otherwise have had under the program;
>
> * * * * *
>
> (iv) To increase the rent to be paid by the tenant or decrease the share of the crop or its proceeds to be received by the sharecropper * * *.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 249

CLEMON BARLOW, *et al.*,

Petitioners,

vs.

B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Services; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

Petitioners Have Standing to Bring This Action.

Respondent denies that standing exists; but does so on the basis of a test that renders the issue of standing virtually indistinguishable from the issue on the merits. Thus, Respondent concedes standing if, and only if, "the Secretary's regulation exposes [Petitioners] to economic coercion by their landlords so to assign which it was a major purpose of Section 8(g) and 7 U.S.C. § 1444(d)(13) to avoid." Resp. Br., p. 17. Yet if the standing test is cast

with such specificity and met, the merits are won, for the Secretary has then defined the term "making a crop" in a manner which defeats not merely congressional intent, but a "major purpose" of the Act as well. Plainly it is not the law that petitioners with standing always win their lawsuits, e.g. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1. However, that is the consequence of the test Respondent now proposes.

The standard the Government advanced in Opposition to Certiorari, pp. 10-11[1] is substantially different. There Respondent "agree[d] with petitioners" that the controlling principles were to be found in both *Hardin* v. *Kentucky Utilities Co., supra,* and *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968). Indeed, Respondent phrased the standing issue by interpolating the facts of this case into the Second Circuit's language in *Norwalk CORE*:

> "'The cases make it clear that the answer [to the question whether petitioners have standing to challenge the Secretary's interpretation of Section 8(g)] turns on whether Congress' purpose in enacting [the "making a crop" language] was to protect their interests.'" Brief in Opposition at 11. See *Norwalk CORE* v. *Norwalk Redevelopment Agency, supra,* 395 F.2d 920.

There was no need to demonstrate for standing purposes that Congress' major purpose was to protect the Petitioners against the exact regulatory change complained of. Respondent now apparently disavows the *Norwalk CORE* decision, as it is neither relied upon nor distinguished.

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[1] Indeed, the present effort is the third test proposed by the Government. In the Courts below, Respondent urged a test precluding protection against economic pressures generally.

Petitioners believe that *Norwalk CORE* properly applies this Court's statement in *Hardin,* 390 U.S. at 7, that "since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see *Stark* v. *Wickard,* 321 U.S. 288, 309 (1944); cf. *United States* v. *ICC,* 377 U.S. 426, 433-34 (1949)." Nor is this any different than the "intended beneficiary" test Petitioners propose at Brief 17-18.[2]

The standing doctrine has, we believe, only two components in a case, as here, where a private litigant "asserts a distinctive or discriminatory impact which specially entitles him to challenge an allegedly illegal administrative action."[3] The basic requirement, "the gist of the question of standing," *Baker* v. *Carr,* 369 U.S. 186, 204 (1962), is that the litigant be "adversely affected in fact" by the administrative action he challenges. *The Chicago Junction Case,* 264 U.S. 258 (1924); *CBS* v. *United States,* 316 U.S. 407 (1942). Actual harm from administrative action not only satisfies the constitutional requisite of a "case or controversy," *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968), but, contrary to the Government's intimations,

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[2] Two questions must be distinguished. One is how it is to be determined that particular statutory language is intended to "protect" or "confer a benefit upon" a would-be litigant where the legislative history of that language is uninformative. We submit that where an entire statutory section is obviously so designed, the purpose that permeates the whole should be held applicable to the part, unless the particular language itself clearly indicates a different purpose. The second question is what does the statute protect against? If the private "interest" allegedly infringed is stated most narrowly, this question is nothing but the question on the merits phrased in a different way.

[3] L. Jaffe, Judicial Control of Administrative Action, 501 (1965). Cases where relief is sought against public officials on the basis of rights as citizen or taxpayer, cf. *Baker* v. *Carr,* 369 U.S. 186, *Flast* v. *Cohen,* 392 U.S. 83, raise additional issues.

comprises the "personal stake in the outcome of the controversy so as to assure concrete adverseness which sharpens presentation of the issues." *Flast* v. *Cohen, supra,* at 99. Genuine and substantial aggrievement also goes far to establish the appropriateness of judicial review. "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967). "[O]ne who is in fact hurt by illegal action should have a remedy." K. Davis, Administrative Law Treatise, § 22.02. See also L. Jaffe, Judicial Control of Administrative Action, 336 (1965). Petitioners are plainly adversely affected in fact by the regulation allowing their landlords unrestricted access to the credit generated by the federal benefits of tenant farmers. Indeed they are the only persons whose interests are directly impaired by the challenged administrative action. Compare *Associated Industries* v. *Ickes,* 134 F.2d 694, 704 (2d Cir. 1943), certiorari vacated as moot, 320 U.S. 707.

Blending with the constitutional minimum is a judicially imposed rule of restraint requiring that the general interest a litigant asserts be one to which Congress has granted some recognition in the statutory program on which reliance is placed.[4] See *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940); cf. *Flast* v. *Cohen, supra.* This latter requirement is imposed for reasons purely pragmatic. Where the statutory scheme evinces no concern with a particular class of litigants or type of harm,

[4] In Professor Jaffe's words, *op. cit. supra* at 508: "Where the legislature has recognized a certain 'interest' as one which must be heeded, it is such a 'legally protected interest' as warrants standing to complain of its disregard."

the assumption is that Congress intended no remedy, and that the Courts have more pressing business than to assure proper execution of the law at the behest of interlopers. Hence there must be a "logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen, supra* at 102. For example, a landowner, though harmed in fact by the prior inability of his tenants to assign for rent, would have no standing to challenge the former regulation; nor would a former supplier of seed to tenants have standing to challenge the present regulation.

But under the *Hardin* and *Norwalk CORE* tests, Petitioners have standing to challenge the present resolution. The legislative history of Section 8(g) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C. § 590h(g) makes clear that the protections which delimit the right to assign were (a) necessary for passage of the bill and (b) imposed to protect tenant and sharecropping farmers from losing their federal benefits by assigning them improvidently, either because of their own bad judgment or because of the pressures to which they were frequently subjected.[5] Thus Congress created a form of spendthrift trust for their benefit. Nor was the conferral of such special protections an unusual event. A network of federal statutory provisions, including provisions in the Upland Cotton Program, seek to ensure that federal agricultural subsidies actually benefit all farmers, non-landowners as well as landowners. Pet. Br. pp. 19-21. The benefits of the former group were not to be siphoned away by speculators, landowners or others.

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[5] Respondent's suggestion, Br. p. 25, that the making a crop limitation was designed to "advance *government* interests by assuring that the federal funds would aid the faltering farm economy," ignores that a major purpose of the federal program, then and now, is to stop people from making too many crops.

Respondent argues that whatever the history of Section 8(g) may be, the legislative history of 7 U.S.C. § 1444(d)(13) bespeaks no similar concerns for small tenant farmers. However, this approach distorts the process of statutory construction. The very fact that Congress chooses to act by incorporating old legislation, with all its protective features, rather than by drafting anew, reflects a belief that the purposes of the old law remain viable. And that Congress still had the plight of tenant farmers very much in mind in enacting the Upland Cotton Program is apparent from 7 U.S.C. § 1444(d)(10) as well as the several protective features of 8(g). It is Section 8(g) which is the source of law herein. The enactment of 7 U.S.C. § 1444(d)(13) cannot be held to have modified its meaning.[6]

II.

Petitioners Are Entitled to Relief on the Merits.

1. The merits are properly before this Court on its unlimited grant of certiorari. If standing is upheld, a remand for determination of the merits would be inappropriate

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[6] Ignoring these considerations, Respondent asserts that the legislative history of 7 U.S.C. § 1444(d)(13) affirmatively reveals a purpose of "expanding" assignments which is relevant to the issue of standing. The argument falls with its premise. How the language in the Conference Report, H.R. Rep. No. 1123, 89th Cong., 1st Sess. p. 33, that "production loans" could be obtained under the new bill reveals an expansive purpose is not apparent. We have detailed in our Brief at 33-37 the legislative history of the 1966 amendment to Section 8(g), 80 Stat. 1167 as amended § 590h(g) which reveals that Congress was there concerned with facilitating the mechanics of assignments and broadened little if at all the right to assign. Furthermore, when Congress wished to draft a broad assignment provision in the Upland Cotton Program, it knew how to do it. 7 U.S.C. § 1305. Congress did desire to make it more convenient to actually make an assignment, but that Congress would desire to make it less time consuming for tenant farmers to effectuate their assignments is in no way inconsistent with Petitioners' position.

because both issues require consideration of the same basic legislative materials. Furthermore, although the Court of Appeals below did not rule on the merits, its position was clearly indicated, as Respondent has recognized. Resp. Brief in Opposition p. 10n.

2. Payment of cash rental for land cannot, Petitioners submit, be deemed part of "making a crop." The agricultural meaning of the phrase, a meaning which is confirmed rather than depreciated by Respondent's search in the dictionaries (Resp. Br. at 25 n. 15), does not include such payments. Undoubtedly, this meaning was familiar to the Senate and House Agricultural Committees. It was also clearly understood by the then Secretary of Agriculture who immediately and specifically barred rent payments—cash or commodity. (See ACP-69, Pet. Br. p. 43.) Cf. *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294 (1933); *Udall* v. *Tallman,* 380 U.S. 1 (1965). It was so understood by successive Secretaries of Agriculture who maintained that limitation. Yet Respondent insists that Congress in saying "to finance making a crop" really meant to say "to finance all current farming costs."[7]

It is alleged in support of this view that the legislative history of Section 8(g) reveals no intent to bar payments of cash rent to landowners, particularly insofar as Congress acquiesced in assignments to landowners to finance other farm purchases. Resp. Br. p. 30. Secondly, it is urged that any congressional purpose to secure the independence of tenant farmers would strikingly appear in the

[7] It is doubtful that the Secretary understands the expenses of "making a crop" to be the equivalent of "current farming costs." Thus, the regulations, 7 C.F.R. § 709.3, apparently do not include securing funds for payment of current wages, an obvious current farming cost, as a permissible assignment purpose.

legislative history of § 8(g) and 7 U.S.C. § 1444(d)(13) insofar as federal farm programs are not designed to alter the structure of landowner-tenant relationships. Resp. Br. pp. 30-31. Finally, it is claimed that the assignment provisions of 7 U.S.C. § 1444(d)(13) are intended for and used by all farmers, and are not intended principally for tenants' benefit. Resp. Br. pp. 31-32. All three contentions are, we believe, erroneous.

Any argument that Congress, in enacting Section 8(g) did not intend to narrow the farming costs for which assignments might be made blinks the fact that the Secretary of Agriculture immediately so understood the statute. Cf. *Udall* v. *Tallman, supra.* Nor was Congress inconsistent in permitting tenants to assign to landowners to secure some purchases while prohibiting assignments to pay rent. Seeds, tools, food, clothing and the like can be bought from numerous sellers; and if the landowner's prices are too high, the tenant can deal elsewhere. The terms of land rental, however, are in the exclusive control of the landowner. As federal law has continually sought to protect the tenant against loss of benefits as a result of manipulation of the terms of land rental, see Pet. Br. pp. 19-21, it was obvious for Congress to bar loss of another type of benefit, credit, as a result of a different form of manipulation. This was done by barring assignments for rent.

Nor does such a congressional intention indicate any desire to change the pattern of economic relationships in the South, a purpose which federal agricultural programs have generally eschewed. Respondent entirely misconceives our argument in thinking we claim that the assignment provisions are intended as a Magna Carta for poor farmers, or that "Section 8(g) was meant radically to revise tenant-

landlord relationships through federal purchase of the tenant's economic independence." Congress' purpose was not to change those relationships, but was to prevent their alteration in response to the availability of federal benefits. This protection does not grant tenant farmers independence in any grandiose sense, but simply assures that the credit resource afforded by assignment of one's own federal benefits in fact goes to the tenant farmer. Tenant farmers are more "independent" as a result of Congress' action only because it is a fact of life that people who have money have options available to them that the utterly destitute do not have.

The absence of legislative declamations of a purpose to effect major social reforms by the assignment provisions is thus entirely understandable. For example, price support payments are one type of federal benefit: Congress has clearly sought to ensure that these funds accrue to the benefit of poor tenant farmers. 16 U.S.C. §§ 590h(e)(f), 7 U.S.C. § 1444(d)(10). Yet in so doing, Congress did not intend "to revise radically" patterns of economic relationships. The same is true when Congress made sure that credit resources, another form of the federal price support payment, would also flow to poor farmers by limiting assignments to those for the purpose of "making a crop."

Respondent's final contention is that the purpose of Section 8(g) and 7 U.S.C. § 1444(d)(13) is to benefit all farmers, not merely tenant farmers, and that the Secretary must have considerable leeway in implementing its terms. First, despite the generality of the statutory language, the purpose of Section 8(g) was clearly to aid tenant and sharecropping farmers; Section 8(g) was part of § 103 of the Agricultural Adjustment Act of 1938, 52 Stat. 35, which

was entitled "Tenant Provisions." Indeed the no discount restriction but affirms this purpose. Further, that Section 8(g) was used primarily by tenant farmers was also known to Congress. Letter of Secretary of Agriculture Charles Brannan to the President of the Senate, January 21, 1952, S.Rep. No. 1305 (1952). While it is true that the legislative history of 7 U.S.C. § 1444(d)(13) does not state expressly that Congress was there motivated by concern for small farmers who rent land (but *cf.* 7 U.S.C. § 1444(d)(10)), Respondent is wrong, for the reasons we have set forth above in the standing context in urging that the contrary is to be assumed.

That some well-off farmers may utilize no-discount assignments is no basis for altering the limitations Congress imposed on assignment rights for the protection of tenant farmers. However, it must be added that Respondent's demonstration utterly fails to convince that the major users of assignments are in fact not poor farmers, potentially subject to exploitation by the persons from whom they rent land. Although the figures are not broken down by Respondent, the vast majority of assignments appears to be for slightly more than $1,000, perhaps $1,300. Respondent's figures, Resp. Br. pp. 10, 31 n. 19, as to "average" assignments on a national basis are distorted by the impact of nearly forty million dollars (out of a national total of only one hundred forty-nine million dollars) being paid to a mere two thousand seven hundred assignors in two states removed from the traditional Southern cottonbelt, Arizona and California, where the patterns of cotton farming are dramatically different.[8]

[8] In Arizona and California, cotton is grown on a very few large and highly mechanized farms. While the yields rate per acre these

Until the Secretary's recent *volte face,* the exact issue herein—the assignability of federal cotton payments to pay cash rent—had been crystal clear. It was clear because of the language Congress employed to limit the right to assign, and clear because of an explicit administrative regulation covering the point. When Congress enacted 7 U.S.C. § 1444(d)(13), incorporating Section 8(g) by reference, it gave no indication that it contemplated or authorized a compromise on the point, a compromise that would severely undercut the ability of tenant farmers to utilize effectively the credit Congress created for them. Rather, the basic premise when Congress acts by incorporating other laws is that their meaning is relatively fixed, not fluid. That premise is entitled to special weight where the language used to incorporate itself implies recognition that the meaning of the statutory language has been spelled out by past administrative construction. Thus striking down the Secretary's newly issued and unauthorized regulation is not a wooden or unique application of the doctrine of congressional ratification of well-settled administrative interpretation.[9] Where the evidence indicates rather clearly that Congress intended a particular

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farmers attain is several times higher than that of traditional cotton producers, see 7 C.F.R. § 722.466, the contribution to the total national crop is small.

[9] However, Respondent's effort, Br. p. 34n., to limit narrowly the doctrine of congressional ratification by re-enactment of a statute with long-standing administrative interpretations to cases where the principle is used as a validating device cannot survive a reading of the cases Respondent cites. Thus, in *Fribourg Navigation Co.* v. *Commissioner,* 383 U.S. 272, this Court plainly held the change in administrative interpretation invalid prospectively as well as retrospectively. Nor were "apparent equities for permitting taxpayer the benefit of prior law" mentioned, save by the dissenters, who pointed out that there had been no reliance on past law. Moreover, Respondent's assertion that the re-enactment doctrine is particu-

construction of the statute for a particular reason, and where that construction was given effect immediately, there is no basis for a change which removes the protection.

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larly appropriate for taxation cases is manifestly unsound. The nub of the "regulations problem" is that Congress does frequently reenact tax laws and it cannot possibly peruse carefully each and every regulation under the Internal Revenue Code.

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SUPREME COURT OF THE UNITED STATES

No. 249.—October Term, 1969

Clemon Barlow et al., Petitioners, v. B. L. Collins, etc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 3, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

The question to be decided in this case is whether tenant farmers eligible for payments under the Upland Cotton Program enacted as part of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U. S. C. (Supp. IV) § 1444 (d), have standing to challenge the validity of a certain amended regulation promulgated by the respondent Secretary of Agriculture in 1966.

The Upland Cotton Program incorporates a 1938 statute, § 8 (g) of the Soil Conservation and Domestic Allotment Act, as amended, 52 Stat. 35, 205, 16 U. S. C. § 590h (g), thereby permitting participants in the program to assign payments only "as security for cash or advances to finance making a crop." [1] The regulation

[1] The Secretary of Agriculture is authorized by 7 U. S. C. § 1444 (d) (5) to pay a farmer in advance of the growing season up to 50% of the estimated benefits due him. Section 1444 (d) (13) authorizes the farmer to assign such benefits subject to the limitations of § 8 (g) of the 1938 Act, 16 U. S. C. § 590 (g). Section 8 (g) as enacted in 1938 and as it read in 1965 established an exception

of the respondent Secretary of Agriculture in effect until 1966 defined "making a crop" to exclude assignments to secure "the payment of the whole or any part of a cash . . . rent for a farm." 20 Fed. Reg. 6512 (1955).[2] Following passage of the 1965 Act, however, and before any payments were made under it, the Secretary deleted the exclusion and amended the regulation expressly to define "making a crop" to include assignments to secure

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to the general prohibition against assignment of federal monies in the Anti-Assignment Act, 31 U. S. C. § 203. Section 8 (g) provided:

"A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances *to finance making a crop*. Such assignment shall be signed by the farmer and witnessed by a member of the county or other local committee . . . . Such assignment shall include the statement that the assignment is not made to pay or secure any pre-existing indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary . . . if payment to the farmer is made without regard to the existence of any such assignment, . . ." 52 Stat. 35, 205 (1938), 16 U. S. C. § 590h (g) (emphasis added).

Section 8 (g) was amended by 80 Stat. 1167 (1966) to permit assignments not only to finance "making a crop" but also to fund "handling or marketing an agricultural commodity, or performing a conservation practice."

[2] 20 Fed. Reg. 6512 (1955) provided:

"*Payment may be assigned to finance making a crop.* A payment which may be made to a farmer . . . under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm."

"the payment of cash rent for land used [for planting, cultivating or harvesting]." 31 Fed. Reg. 2815 (1966).[3]

Petitioners, cash rent tenant farmers suing on behalf of themselves and other farmers similarly situated, filed this action in the District Court for the Middle District of Alabama. They sought a declaratory judgment that the amended regulation is invalid and unauthorized by statute, and an injunction prohibiting the respondent federal officials from permitting assignments pursuant to the amended regulation.[4] Their complaint

[3] 32 Fed. Reg. 14921 (1967), 7 CFR § 709.3 (1969) now provides:
"*Purposes for which a payment may be assigned.*

"(a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any preexisting indebtedness of any nature whatsoever.

"(b) To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor, or (2) to provide food, clothing, and other necessities required by the producer or persons dependent upon him.

"(c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm."

[4] The respondents, in addition to the Secretary of Agriculture, are the State Executive Director of the Agricultural and Conservation Service in Alabama, and the administrator of that Service in the U. S. Department of Agriculture. The complaint also included counts against petitioners' landlord alleging that he acted improperly to deprive them of their right to receive subsidy payments, and, further, that some of the petitioners had been illegally evicted because of their participation in litigation with respect to the cotton program, and, in the case of one petitioner, because of his candidacy for Alabama Agricultural and Conservation Service county committeeman. The District Court denied the landlord's motion to dismiss these counts and transferred them for trial to the Southern District of Alabama. That ruling is not before us.

alleged that the petitioners are suffering irreparable injury under the amended regulation because it provides their landlord "with the opportunity to demand that [they] and all those similarly situated assign the [Upland Cotton Program] benefits in advance as a condition to obtaining a lease to work the land." [5] As a result, the complaint stated, the tenants are required to obtain financing of all their other farm needs—groceries, clothing, tools and the like—from the landlord as well, since prior to harvesting the crop they lack cash and any source of credit other than the landlord. He, in turn, the complaint alleges, levies such high prices and rates of interest on these supplies that the tenants' crop profits are consumed each year in debt payments. Petitioners contend that they can attain a "modest measure of economic independence" if they are able to use their "advance subsidy payments . . . [to] form cooperatives to buy [supplies] at wholesale and reasonable prices in lieu of the excessive prices demanded by [the landlord] of . . . captive consumers with no funds to purchase elsewhere." Thus, petitioners allege that they suffer injury in fact from the operation of the amended regulation.

The District Court, in an unreported opinion, held that the petitioners "lack standing to maintain this action against these [respondent] governmental officials," because the latter "have not taken any action which invades any legally protected interest of the plaintiffs." The Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. 398 F. 2d 398. It held that

[5] The complaint stated that some of the petitioners "were denied the right to work the land" when they refused to execute assignments to their landlord. The complaint also alleged that "[p]laintiffs have been tenant farmers on this land from eleven to sixty-one years . . . and [two of them] have been on this land all their lives."

petitioners lacked standing not only because they alleged no invasion of a legally protected interest but also because petitioners "have not shown us, nor have we found any provision of the Food and Agriculture Act of 1965 which either expressly or impliedly gives [petitioners] standing to challenge this administrative regulation or gives the Courts authority to review such administrative action." *Id.*, at 402. We granted certiorari. 395 U. S. 958.

Our decision in *Data Processing Service* v. *Camp, ante,* at —, leads us to reverse here.

First, there is no doubt that in the context of this litigation the tenant farmers, petitioners here, have the personal stake and interest that impart the concrete adverseness required by Article III.

Second, the tenant farmers are clearly within the zone of interests protected by the Act.

Implicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of tenant farmers. Both of the relevant statutes expressly enjoin the Secretary to do so. The Food and Agriculture Act of 1965 states that "[t]he Secretary shall provide adequate safeguards to protect the interests of tenants. . . ." 79 Stat. 1196, 7 U. S. C. (Supp. IV) § 1444 (d)(10).[6] 7 U. S. C. (Supp. IV) § 1444 (d)(13), as noted earlier, incorporates by reference § 8 (g), as amended, 52 Stat. 35, 205, 16 U. S. C. §§ 590h (g), 8 (b) of that Act, in turn, provides that "the Secretary shall, as far as practicable, protect the interests of tenants. . . ." 52 Stat. 32, 7 U. S. C. § 590 (h)(6). The legislative history of the "making a crop"

[6] In connection with the amended regulations, the Secretary issued under § 1444 (d)(10) various rules designed to ensure that tenants receive their fair share of the federal payments. 31 Fed. Reg. 4887–4888; 7 CFR 722.817, 794.3.

provision, though sparse, similarly indicates a congressional intent to benefit the tenants.[7] They are persons "aggrieved by agency action within the meaning of a relevant statute" as those words are used in 5 U. S. C. § 702.

Third, judicial review of the Secretary's action is not precluded. The Court of Appeals rested its holding on the view that no provision of the Food and Agriculture Act of 1965 "expressly or impliedly . . . gives the Courts authority to review such administrative action." 398 F. 2d, at 402. Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.

The Administrative Procedure Act, 80 Stat. 392, 5 U. S. C. § 701 (a), allows judicial review of agency action except where "(1) statutes preclude judicial review or (2) agency action is committed to agency discretion by law." The amended regulation here under challenge was promulgated under 16 U. S. C. § 590 (d)(3) which authorizes the Secretary to "prescribe such regulations, as he may deem proper to carry out the provisions of this chapter." Plainly this provision does not expressly preclude judicial review, nor does any other provision in either the 1938 or 1965 Acts. Nor does the

[7] See the remarks of Rep. Fulmer, 82 Cong. Rec. 844 (1937), and of Senator Adams, *id.*, at 1756. The fact that assignments could be made at all indicated a congressional concern for the farmers' welfare, in light of the general statutory prohibition on assignment of federal claims embodied in the Anti-Assignment Act, 31 U. S. C. § 203. This concern was noted in a letter from the Secretary of the Department of Agriculture to the President of the Senate in January 1952, in which the Secretary stated that § 8 (g) "was enacted for the purpose of creating additional credit to farmers to assist them in financing farming operations." S. Rep. No. 1305 (1952).

authority to promulgate such regulations "as he may deem proper" in § 590(d)(3) constitute a commitment of the task of defining "making a crop" entirely to the discretionary judgment of the Executive Branch without the intervention of the courts. On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U. S. 263, 268–270. "The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise . . . . '[W]here the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 14 (HARLAN, J., dissenting). Therefore the permissive term "as he may deem proper," by itself, is not to be read as a congressional command which precludes a judicial determination of the correct application of the governing canons.

The question then becomes whether nonreviewability can fairly be inferred. As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom* v. *Kyne*, 358 U. S. 184; *Harmon* v. *Brucker*, 355 U. S. 579; *Stark* v. *Wickard*, 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. In *Abbott Laboratories* v. *Gardiner*, 387 U. S. 136, 140, we held that "judicial review of final agency action by an aggrieved person will not be cut off unless there is per-

suasive reason to believe that such was the purpose of Congress." A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories* v. *Gardiner*, *supra*, at 141. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. See the *Chicago Junction Case*, 264 U. S. 258; *Hardin* v. *Kentucky Utilities*, *supra*.

We hold that the statutory scheme at issue here is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action.

The judgments of the Court of Appeals and of the District Court are vacated and the case is remanded to the District Court for a hearing on the merits.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 85 & 249.—October Term, 1969

Association of Data Processing Service Organizations, Inc., et al., Petitioners, v. William B. Camp, Comptroller of the Currency of the United States, et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
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Clemon Barlow et al., Petitioners, v. B. L. Collins, etc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[March 3, 1970]

Mr. Justice Brennan, with whom Mr. Justice White joins, concurring and dissenting.

I concur in the result in both cases but dissent from the Court's treatment of the question of standing to challenge agency action.

The Court's approach to standing, set out in *Data Processing*, has two steps: (1) since "the framework of Article III . . . restricts judicial power to 'cases' and 'controversies,'" the first step is to determine "whether the plaintiff alleges that the challenged action has caused him injury in fact"; (2) if injury in fact is alleged, the relevant statute or constitutional provision is then examined to determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

My view is that the inquiry in the Court's first step is the only one which need be made to determine standing. I had thought we discarded the notion of any

additional requirement when we discussed standing solely in terms of its constitutional content in *Flast* v. *Cohen*, 392 U. S. 83 (1968). By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.[1] *Barlow* is a typical illustration of the harm which resulted from that requirement. The only substantial issue in that case goes to the merits: does the statutory language "making a crop" create a legally protected interest for tenant farmers in the form of a prohibition against the assignment of their federal benefits to secure cash rent? By confusing the merits with the plaintiffs' standing to challenge the Secretary's action, both the District Court and the Court of Appeals denied the farmers the focused and careful decision on the merits to which they are clearly entitled. Although this Court properly reverses the Court of Appeals on that account, it encourages more *Barlow* decisions by engrafting its wholly unnecessary and inappropriate second step upon the constitutional requirement for standing.

Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made not to determine *standing* but to determine an aspect of *reviewability*, that is whether Congress

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[1] Compare the language in *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700 (C. A. 2d Cir. 1943): "In a suit in a federal court by a citizen against a government officer, complaining of alleged past . . . unlawful conduct by the defendant, there is no justiciable 'controversy' . . . unless the citizen shows that such conduct . . . invades . . . a private substantive legally protected right of the plaintiff citizen; such invaded interest must be either of a 'recognized' character at 'common law' or a substantive private legally protected interest created by statute [or Constitution]."

meant to deny or to allow judicial review of the agency action at the instance of the plaintiff.[2] The Court in the present cases examines the statutory materials for just this purpose but only after making the same examination during the second step of its standing inquiry. Thus in *Data Processing* the Court determines that the plaintiffs have standing because they alleged injury in fact and because "§ 4 [of the Bank Service Corporation Act of 1962] arguably brings a competitor within the zone of interests protected by it." The Court then determines that the Comptroller's action is reviewable at the instance of the plaintiffs because "[b]oth [the Bank Service Corporation Act and the National Bank Act] are clearly 'relevant' statutes within the meaning of [the Administrative Procedure Act, 5 U. S. C. § 702]. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.' " Again in *Barlow*, the plaintiff tenant farmers are found to have standing because they alleged injury in fact and because "tenant farmers are . . . within the zone of interests protected by the Act." Examination of the same statutory materials subsequently leads the Court to the conclusion that the tenant farmers are entitled to judicial re-

[2] Reviewability has often been treated as if it involved a single issue: whether agency action is conclusive and beyond judicial challenge by anyone. In reality, however, reviewability is equally concerned with a second issue: whether the *particular* plaintiff then requesting review may have it. See the Administrative Procedure Act, 5 U. S. C. §§ 701 (a) and 702. Both questions directly concern the extent to which persons harmed by agency action may challenge its legality.

view of the Secretary's action because "the statutory scheme . . . is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action."

I submit that in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such.

I

Standing

Although *Flast* v. *Cohen* was not a case challenging agency action, its determination of the basis for standing should resolve that question for all cases. We there confirmed what we said in *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." "In other words," we said in *Flast*, "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue" and not whether the controversy is otherwise justiciable,[3] or

[3] Other elements of justiciability are, for instance, ripeness, *e. g.*, *Poe* v. *Ullman*, 367 U. S. 497 (1961), mootness, *e. g.*, *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), and the policy against friendly or collusive suits, *e. g.*, *Chicago & Grand Trunk R. Co.* v.

whether, on the merits, the plaintiff has a legally protected interest which the defendant's action invaded. 392 U. S., at 99–100. The objectives of the Article III standing requirement are simple: the avoidance of any use of a "federal court as a forum [for the airing of] generalized grievances about the conduct of the government," and the creation of a judicial context in which "the questions will be framed with the necessary specificity, . . . the issues . . . contested with the necessary adverseness and . . . the litigation . . . pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.*, at 106. Thus, as we held in *Flast*, "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.*, at 101.[4] See also *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83–84 (1958).

Wellman, 143 U. S. 339 (1892); *United States* v. *Johnson*, 319 U. S. 302 (1943). "Justiciability" is also the term of art used to refer to the constitutional necessity that courts not deal with certain issues lest they "intrude into areas committed to other branches of government." *Flast, supra*, at 95. The political question doctrine has its analogue in the sphere of administrative law in the concept of nonreviewability. See, *e. g., Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948); *Shilling* v. *Rogers*, 363 U. S. 666 (1960). And, of course, federal courts may not decide questions over which they lack jurisdiction, *e. g., Brown Shoe Co.* v. *United States*, 370 U. S. 294, 305 (1962); *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17–18 (1951). Thus, on many grounds other than an absence of standing, a court may dismiss a lawsuit without proceeding to the merits to determine whether the plaintiff presents a claim upon which relief may be granted, and, if so, whether he has borne his burden of proof.

[4] It is true, of course, that in certain types of litigation parties may properly request judicial resolution of issues not "presented in an adversary context." See Davis, Standing: Taxpayers and Others,

In light of *Flast*, standing exists when the plaintiff alleges, as the plaintiffs in each of these cases alleged, that the challenged action has caused him injury in fact, economic or otherwise.[5] He thus shows that he has the requisite "personal stake in the outcome" of his suit. *Baker* v. *Carr*, *supra*, at 204. We may reasonably expect that a person so harmed will, as best he can, frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously.[6] Recognition of his standing to litigate is then

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35 U. Chi. L. Rev. 601, 607 (1968). But in most instances, among them private challenges to agency action, the plaintiff must establish his adverseness to obtain standing.

[5] Thus, for purposes of standing, it is sufficient that a plaintiff allege *damnum absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant's action. Injury in fact has generally been economic in nature, but it need not be. See, *e. g.*, *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608 (C. A. 2d Cir. 1965); *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994 (C. A. D. C. Cir. 1966). The more "distinctive or discriminating" the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the constitutional test. See Jaffe, Judicial Control of Administrative Action 501 (1965). The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to the agency action. Thus, I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public.

[6] Past decisions of this Court indicate that a person who has suffered injury in fact meets the relevant Article III requirement. See, for example, *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476–477 (1940); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942). In these decisions the Court permitted parties economically harmed by administrative action to challenge it although no legal interest of the parties was found to have been invaded by the action. The Court stated in *Scripps-Howard Radio*, *supra*, at 14, that "[t]he Communications Act of 1934 did not create new private

consistent with the Constitution, and no further inquiry is pertinent to its existence.

II

Reviewability

When the legality of administrative action is at issue, standing alone will not entitle the plaintiff to a decision on the merits. Pertinent statutory language, legislative history and public policy considerations must be examined to determined whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs. Under the Administrative Procedure Act (APA), "statutes [may] preclude judicial review" or "agency action [may be] committed to agency discretion by law." 5 U. S. C. § 701 (a). In either case, the plaintiff is out of court, not because he had no standing to enter, but because Congress has stripped the judiciary of authority to review agency action. Review may be totally foreclosed, as in *Schilling* v. *Rogers*, 363 U. S. 666 (1960), or, if permitted, it may nonetheless be denied to the plaintiff's class. But the governing principle laid down in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), is that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

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rights. The purpose of the Act was to protect the public interest in communications. By § 402 (b)(2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action." Accordingly, since Congress cannot expand the Article III jurisdiction of federal courts, *Muskrat* v. *United States*, 219 U. S. 346 (1911), it follows that injury in fact renders a party adverse under the Constitution. Cf. Davis, 3 Administrative Law Treatise § 22.02, at 211 (1958); Jaffe, *supra*, n. 5, at 336.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. § 702. Congressional intent that a particular plaintiff have review may be found either in express statutory language granting it to the plaintiff's class,[7] or, in the absence of such express language, in statutory indicia from which a right to review may be inferred.[8] Where, as in the instant cases, there is no express grant of review, reviewability has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim. See, for example, the *Chicago Junction Case*, 264 U. S. 258 (1924); *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1 (1968); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (C. A. 2d Cir. 1968). In light of *Abbott Laboratories*, slight indicia that the plaintiff's class is a beneficiary will suffice to support the inference.[9]

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[7] See, *e. g.*, the Securities Act, which provides that "[a]ny person aggrieved by an order of the Commission may obtain a review," 15 U. S. C. § 77i (a), and the Federal Power Act which grants review to "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding . . . ." 16 U. S. C. § 825*l* (b).

[8] Section 702 also provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." Though a person suffering such wrong is clearly entitled to review, he need not show the existence of a legally protected interest to establish either his standing or his right to review. The existence of that interest is a question of the merits.

[9] This is particularly the case when the plaintiff is the only party likely to challenge the action. Refusal to allow him review would, in effect, commit the action wholly to agency discretion, thus risking frustration of the statutory objectives.

III

The Merits

If it is determined that a plaintiff who alleged injury in fact is entitled to judicial review, inquiry proceeds to the merits—to whether the specific legal interest claimed by the plaintiff is protected by the statute and to whether the protested agency action invaded that interest.[10] It is true, of course, that matters relevant to the merits will already have been touched tangentially in the determination of standing and, in some cases, in the determination of reviewability. The aspect of the merits touched in establishing standing is the identification of injury in fact, the existence of which the plaintiff must prove. The merits are also touched in establishing reviewability in cases where the plaintiff's right to review must be inferred from evidence that his class is a statutory beneficiary. The same statutory indicia that afford the plaintiff a right to review also bear on the merits, because they provide evidence that the statute protects his class, and thus that he is entitled to relief if he can show that the challenged agency action violated the statute. Evidence that the plaintiff's class is a statutory beneficiary, however, need not be as strong for the purpose of obtaining review as for the purpose of establishing the plaintiff's claim on the merits. Under *Abbott Laboratories*, slight beneficiary indicia will suffice to establish his right to have review and thus to reach the merits.

IV

To reiterate, in my view alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its

[10] If the alleged legal interest is clearly frivolous, or proof to substantiate the alleged injury in fact is wholly lacking, the plaintiff can be hastened from court by summary judgment.

own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions which may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of "standing." The books are full of opinions which dismiss a plaintiff for lack of "standing" when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest which he claimed,[11] or on his failure to prove that the challenged agency action was reviewable at his instance.[12]

The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing. Today's decisions, however, will only compound present confusion and breed even more litigation over standing. In the first place, the Court's formulation of its nonconstitutional element of standing is obscure. What precisely must a plaintiff do to establish that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute"? How specific an "interest" must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest? When, too, is his interest "arguably"

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[11] *E. g., Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118 (1939); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 406 F. 2d 837, 843 (C. A. 8th Cir. 1969); *Barlow* v. *Collins*, 398 F. 2d 398, 401 (C. A. 5th Cir. 1968).

[12] *E. g., Association of Data Processing Service Organizations, Inc.* v. *Camp, supra*, at 843; *Barlow* v. *Collins, supra*, at 401-402; *Harrison-Halsted Community Group, Inc.* v. *Housing & Home Finance Agency*, 310 F. 2d 99 (C. A. 7th Cir. 1962).

within the appropriate "zone"? Does a mere allegation that it falls there suffice? If more than an allegation is required, is the plaintiff required to argue the merits? And what is the distinction between a "protected" and a "regulated" interest? Is it possible that a plaintiff may challenge agency action under a statute which unquestionably regulates the interest at stake, but which expressly excludes the plaintiff's class from among the statutory beneficiaries?

In the second place, though the Court insists that its nonconstitutional standing inquiry does not involve a determination of the merits, I have grave misgivings on this score. The formulation of the inquiry most certainly bears a disquieting similarity to the erroneous notion that a plaintiff has no standing unless he can establish the existence of a legally protected interest. Finally, assuming that the inquiry does not, in fact, focus on the merits, then surely it serves only to determine whether the challenged agency action is reviewable at the instance of the plaintiff in cases where there is no express statutory grant of review to members of his class.[13] And, if this is so, it has no place in the determination of standing. In terms of treating related questions with one another, this inquiry is best made in the reviewability context. The Constitution requires for standing only that the plaintiff allege that actual harm resulted to him from the agency action. Investigation to determine whether the constitutional requirement has been met has nothing in common with the inquiry into statutory language, legislative history and

[13] In cases involving statutes that do expressly grant the plaintiff a right to review, there would be no need for the Court's second standing inquiry—unless it serves to provide a preview of the merits.

public policy which must be made to ascertain whether Congress has precluded or limited judicial review.[14] More fundamentally, an approach which treats separately the distinct issues of standing, reviewability, and the merits, and decides each on the basis of its own criteria, assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done. The Court's approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits. The Court's approach must trouble all concerned with the function of the judicial process in today's world. As my Brother DOUGLAS has said: "The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done . . . it is abdication for courts to close their doors." *Flast* v. *Cohen, supra,* at 111 (concurring opinion).

[14] I would apply my view that all examination of statutory language and congressional intent, as they bear on the right of the plaintiff to challenge agency action, should be made only in the reviewability context even if the pertinent statutory material speaks of "standing" or "statutory aid to standing." Statutory materials, of course, would be properly consulted in the determination of standing if they purport to define what constitutes injury in fact.